Supreme Court, U.S.
FILED
JUL 13 1998
OFFICE OF THE CLERK

No. 98-___ 98-124

In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY, A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK,
A Municipal Corporation, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD K. SIMON*
McDERMOTT, WILL & EMERY
2049 Century Park East
Suite 3400
Los Angeles, CA 90067
(310) 277-4110

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 pp

QUESTION PRESENTED FOR REVIEW

1. Whether a political subdivision of a state may maintain an action under the Supremacy Clause of the United States Constitution to challenge state action that conflicts with federal law.

LISTING OF PARTIES

The parties to the proceedings below were petitioner Burbank-Glendale-Pasadena Airport Authority, a joint powers agency organized and existing pursuant to California law, and respondents the City of Burbank, a municipal corporation, the State of California, and James van Loben Sels in his official capacity as Director of the Department of Transportation of the State of California.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LISTING OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS ENTERED BELOW 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

THE JURISDICTIONAL QUESTION RAISED BY THIS CASE IS IMPORTANT AND HAS RECEIVED CONFLICTING ANSWERS IN THE COURTS OF APPEAL 6

A. The Court's Precedent Leaves Critical Issues Unresolved and the Question Presented Should Be Decided Now 8

B. The Lower Courts Apply The Court's Precedent In An Inconsistent Manner 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991) 10, 12

Arlington Heights v. Regional Transp. Auth., 653 F.2d 1149 (7th Cir. 1981) 10

Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984) 10

Board of Educ. v. Allen, 392 U.S. 236 (1968) 8

Branson Sch. Dist. Re-82 v. Romer, 958 F. Supp. 1501 (D. Colo. 1997) 13

Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 4

Burbank-Glendale-Pasadena Airport Authority v. Los Angeles, 979 F.2d 1338 (9th Cir. 1992) 4, 13

Carlsbad Union Sch. Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969) 13

Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 6

City of Charleston v. Public Serv. Comm'n, 57 F.3d 385 (4th Cir.), *cert. denied*, 516 U.S. 974 (1995) 10

City of Los Angeles v. Federal Aviation Administration, 138 F.3d 806 (9th Cir. 1998) 5

Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 9

Douglas Indep. Sch. Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D.S.D. 1968) 13

Evanston v. Regional Transp. Auth., 559 N.E.2d 899 (Ill. App. 1990) 10

TABLE OF AUTHORITIES – Continued

Page

Ex parte Young, 209 U.S. 123 (1908) 6

Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968) 13

Hines v. Davidowitz, 312 U.S. 52 (1941) 6

Housing Auth. of Kaw Tribe of Indians of Oklahoma v. Ponca City, 952 F.2d 1183 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1992) 10

Hunter v. Pittsburgh, 207 U.S. 161 (1908) ..9, 10, 11, 12, 13

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997) 5

Kenai Peninsula Borough v. Department of Community & Regional Affairs, 751 P.2d 14 (Alaska 1988) 10

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985) 8, 9, 10, 11

New York v. Richardson, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) 10

Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) 11, 12

School Board v. Baliles, 829 F.2d 1308 (4th Cir. 1987) 12

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 6

South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) 5, 6, 7, 10, 11, 13

South Macomb Disposal Auth. v. Washington, 790 F.2d 500 (6th Cir. 1986) 10, 12

TABLE OF AUTHORITIES – Continued

Page

Star-Kist Foods, Inc. v. County of Los Angeles, 719 P.2d 987 (Cal. 1986), *cert. denied*, 480 U.S. 930 (1987) 10, 12

Trenton v. New Jersey, 262 U.S. 182 (1923) 7, 9

Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969) 13

United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) 10, 12

Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) 8, 9, 10, 11

Williams v. Baltimore, 289 U.S. 36 (1933) 7, 9

Williamson v. New Jersey, 130 U.S. 189 (1889) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. VI, Cl. 2 ..... *passim*

STATE STATUTES

Cal. Pub. Util. Code § 21661.6 4

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming dismissal of this action based on the district court's conclusion that Petitioner, because it is a political subdivision of the State of California, lacks standing to challenge a California statute in federal court.

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 136 F.3d 1360 (9th Cir. 1998).

The order of the District Court for the Central District of California dismissing this action (Appendix B, *infra*) is unreported.

The order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing (Appendix C, *infra*) is unreported.

CONSTITUTIONAL PROVISIONS INVOLVED

The supremacy clause, United States Constitution, Article VI, clause 2, provides: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."

JURISDICTION

The decision of the court of appeals was entered on March 2, 1998. Petitioner sought a rehearing and suggested that the court rehear the appeal en banc. The petition for rehearing was denied on April 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the question whether a political subdivision of a state, faced with conflicting federal and state law, may seek from the courts a determination as to which law controls. In the Ninth Circuit, it may not. Political subdivisions – bound to follow federal law like all other entities – are thus prohibited from seeking judicial decisions on important preemption issues.

Petitioner Burbank-Glendale-Pasadena Airport Authority ("Airport Authority") is one such political subdivision. The Airport Authority owns and operates the Burbank-Glendale-Pasadena Airport ("Airport"). The Airport, a federally-funded commercial air transportation facility, serves more than five million passengers each year in intra- and inter-state commerce. Pursuant to federal law, the Airport Authority works hand in hand with the Federal Aviation Administration ("FAA") to ensure the safety of the users of the Airport and to secure the Airport's role in the national aviation system.

In their attempt to achieve these goals, the Airport Authority and the FAA have concluded that the Airport

must move its passenger terminal, built on its present site in 1930, to improve the safety of its runways and taxiways, which serve large, high-speed, modern commercial jet aircraft.[1] The City of Burbank ("Burbank"), aided by

---

[1] As situated, the current terminal building fails to comply with important FAA safety criteria. These are:

(a) *The Building Restriction Line* ("BRL")

This structure setback requirement, established pursuant to FAA design standards published in FAA Advisory Circular 150/5300 and on the Airport's approved Airport Layout Plan, is designed to encompass the specific "protection zones" and "protection areas," as well as to retain clearances for navigation aid placement, instrument procedures and air traffic control tower lines of sight. For the Airport, the BRL is *750 feet* to each side of the centerline of each runway. The passenger terminal currently sits approximately *300 feet* from the centerline of the runways.

(b) *The Runway Object Free Area* ("OFA")

The *400 foot* OFA, also established by Advisory Circular 150/5300, is intended to preclude parked aircraft, structures and other objects from being located within 400 feet of runway centerlines. It is violated as to both runways by both the terminal building and aircraft parked at terminal gates.

(c) *The Obstacle Free Zone* ("OFZ") *Transitional Surface*

The OFZ is a clear zone covering all property within 200 feet of the runway centerlines (per Advisory Circular 150/5300). On instrument runways, it continues outward after the end of the runway at a 3:1 slope. The tails of aircraft parked at gates on the terminal's eastern concourse extend through this sloped surface.

(d) *Part 77 Primary and Transitional Surfaces*

Federal Aviation Regulations Part 77 establishes a variety of "clear zones," using imaginary surfaces extending over and beyond runways. These regulations are designed to protect the integrity of runway surfaces and adjacent air space. The Part 77 Primary Surface is a *500 foot* area on either side of runway

the State of California, seeks to delay, or to exert control over, the terminal relocation project to limit the noise it believes the relocation will cause. To that end, it has invoked California Public Utilities Code section 21661.6 ("Statute").[2]

This action challenges the constitutionality of the Statute and implementing procedures adopted by Burbank ("Procedures"). The Airport Authority contends that under the Court's decision in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and the Ninth Circuit decision in *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), the Statute and the Procedures are preempted by federal law, both

---

centerlines that is to be kept free of any objects not required to be located within the area as a result of their function (such as navigational aids). The Transitional Surface is defined by a 7:1 slope beginning at the outer edge of the Primary Surface, and is intended to limit the height of objects as they approach the runway surfaces. The terminal and all parked aircraft violate both Part 77 surfaces on both runways.

[2] The Statute provides, in relevant part:

"(a) Prior to the acquisition of land by any political subdivision for the purposes of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of the property may begin."

facially and as applied to the terminal relocation project. Individually and together the Statute and the Procedures represent an impermissible attempt by non-proprietor governmental entities both to delay and condition a project that enhances runway safety pursuant to federal safety regulations and to exercise control over airport noise.

The Airport Authority filed this lawsuit against Burbank to secure its right to move forward with its FAA approved terminal relocation project[3] without interference from Burbank.[4] Burbank filed counterclaims against the Airport Authority. James van Loben Sels in his official capacity as Director of the Department of Transportation of the State of California and the State of California were joined as defendants.[5]

On March 31, 1997, the district court, following the Ninth Circuit decision in *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), dismissed the Airport Authority's action on the grounds that the Airport

---

[3] On March 15, 1996, the FAA issued a Record of Decision approving the proposed terminal relocation project. Burbank's challenge to the FAA's conclusion was rejected by the Ninth Circuit. *City of Los Angeles v. Federal Aviation Administration*, 138 F.3d 806 (9th Cir. 1998).

[4] The Airport Authority contends that the district court had subject matter jurisdiction over its claims pursuant to 28 U.S.C. §§ 1331, 1343 and 2201(a).

[5] The State of California moved to intervene in the action as a defendant and therefore waived any protections afforded to the State by the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (a state can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it).

Authority, as a political subdivision of the State of California, lacks standing in federal court to challenge the constitutionality of the state Statute and Burbank's Procedures. On March 2, 1998, the Ninth Circuit, also relying on *South Lake Tahoe*, affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

THE JURISDICTIONAL QUESTION RAISED BY THIS CASE IS IMPORTANT AND HAS RECEIVED CONFLICTING ANSWERS IN THE COURTS OF APPEAL

The Supremacy Clause, U.S. Const., Art. VI, Cl. 2, invalidates any exercise of state power that unduly frustrates or obstructs the objectives of legitimate national policy. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).[6] It is beyond dispute that a political subdivision, like any other entity, can be profoundly affected by state action that conflicts with federal law. Indeed, in many instances, a political subdivision – like a school board charged with protecting the welfare of its students or an airport authority responsible for ensuring the safety of air travelers – may be the only entity sufficiently positioned to challenge such action. Consequently, if the Supremacy Clause's mandate that federal law "shall

[6] A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is preempted by a federal statute presents a federal question that the federal courts have jurisdiction to resolve. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (*citing Ex parte Young*, 209 U.S. 123, 160-62 (1908)).

be the supreme law of the Land" is to be achieved, the Supremacy Clause *must* be enforceable by political subdivisions of states as well as by individuals. If political subdivisions are prevented from challenging preempted state legislation and regulation, such legislation and regulation may go unchecked even though expressly prohibited by the Constitution.

In the present case, the lower court held that a political subdivision of a state lacks standing to challenge the validity of state action under any provision of the United States Constitution, including the Supremacy Clause. Although the lower court treated the issue as a standing issue, the Ninth Circuit in fact holds that a political subdivision has no substantive constitutional rights to assert against its state. *See South Lake Tahoe*, 625 F.2d at 232. The Circuit's decision was based on a line of cases holding that a municipal corporation, created by a state for the better ordering of government, has *no* privileges and immunities under the Federal Constitution which it may invoke in opposition to the will of its creator. *See Williams v. Baltimore*, 289 U.S. 36 (1933); *Trenton v. New Jersey*, 262 U.S. 182 (1923); *Williamson v. New Jersey*, 130 U.S. 189 (1889). This rule has been followed in both federal and state courts to prohibit political subdivisions from mounting constitutional challenges to state action in *any* forum.

The Ninth Circuit's decision prohibiting the Airport Authority from challenging a preempted state statute, however, conflicts with decisions of the Court that permit political subdivisions to assert constitutional challenges to state action. Moreover, the lower court's decision creates a conflict among the Circuits on the question

whether a political subdivision – even if unable to challenge state action under the Fourteenth Amendment – may maintain a constitutional challenge to state action under the Supremacy Clause. It is time for the Court to consider and resolve this important jurisdictional issue.

A. The Court's Precedent Leaves Critical Issues Unresolved and the Question Presented Should Be Decided Now

During the last thirty years, the Court has repeatedly considered – without expressly addressing – a political subdivision's right to assert constitutional claims against its state. Uniformly, the Court has permitted such challenges to proceed. In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court permitted a local board of education to challenge under the Establishment and Free Exercise Clauses of the First Amendment a New York statute requiring local public schools to lend textbooks free of charge to students in public and private schools. In *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982), the Court permitted three Washington school districts to sue their State under the Fourteenth Amendment to enjoin the enforcement of a statewide voter initiative that shifted control over school busing plans from the local to the state level.[7] And, in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), the Court permitted Lawrence County, a political subdivision of the State of South

---

[7] On the merits, the Court ruled that the challenged state law was unconstitutional and that the Seattle School District was entitled to attorney's fees as the prevailing party in the litigation. *Seattle School District*, 458 U.S. at 487 n.31.

Dakota, to challenge a South Dakota statute governing the distribution of school funding on the grounds that the statute conflicted with federal law specifying how certain funds should be disbursed.

Although *Brown*, *Seattle School District* and *Lead-Deadwood* appear to foreclose any argument that a political subdivision may not wage a constitutional challenge to state law, the lower courts have been unwilling to read these cases so broadly. This is so because the rule prohibiting a political subdivision from asserting a constitutional challenge to state action also emanates from the Court. The line of cases (commonly referred to as the *Hunter* or *Trenton* line of cases) begins with *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which Chief Justice Marshall articulated the view that in many respects states had the right to exercise unfettered control over their political subdivisions. *Hunter v. Pittsburgh*, 207 U.S. 161 (1908), adopted a similar view, declaring that municipal corporations, as political subdivisions of the state, are largely subject to their creator's will and thus without federal constitutional protection in many respects. In *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923), the Court stated that "[t]he power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned." And, in *Williams v. Baltimore*, 289 U.S. 36, 40 (1933), the Court stated that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

While permitting political subdivisions to assert constitutional rights against their states, *Brown*, *Seattle School District* and *Lead-Deadwood* did not analyze – much less expressly overrule – the *Hunter* line of cases.[8] Consequently, the lower courts have been unable to reject these cases. *See, e.g., New York v. Richardson*, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991); *City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385 (4th Cir.), *cert. denied*, 516 U.S. 974 (1995); *Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); *South Macomb Disposal Auth. v. Washington*, 790 F.2d 500 (6th Cir. 1986); *Arlington Heights v. Regional Transp. Auth.*, 653 F.2d 1149 (7th Cir. 1981); *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980); *Housing Auth. of Kaw Tribe of Indians of Oklahoma v. Ponca City*, 952 F.2d 1183 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1992); *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986); *cert. denied*, 479 U.S. 1085 (1987). State courts, too, have applied the *Hunter* rule to prohibit political subdivisions from asserting constitutional rights against their states. *See, e.g., Kenai Peninsula Borough v. Department of Community & Regional Affairs*, 751 P.2d 14 (Alaska 1988); *Star-Kist Foods, Inc. v. County of Los Angeles*, 719 P.2d 987 (Cal. 1986), *cert. denied*, 480 U.S. 930 (1987); *Evanston v. Regional Transp. Auth.*, 559 N.E.2d 899 (Ill. App. 1990).

Until the Court definitely and expressly overrules the *Hunter* line of cases, the lower courts will continue to

---

[8] Indeed, the *Lead-Deadwood* Court reached its conclusion despite the dissenters' contention that *Hunter* forbade such a result. 469 U.S. at 270-71 (Rehnquist, J., dissenting).

follow the rule set forth in those cases and prohibit political subdivisions from challenging state action under the United States Constitution.[9] If so, actions such as those reviewed by the Court in *Brown*, *Seattle School District* and *Lead-Deadwood*, may go unchecked.

B. The Lower Courts Apply The Court's Precedent In An Inconsistent Manner

Even if the Court concludes that *Brown*, *Seattle School District* and *Lead-Deadwood* did not overrule the *Hunter* line of cases, review of the Ninth Circuit's absolute prohibition against constitutional challenges to state action is necessary to ensure uniform application of the *Hunter* rule in the federal courts. While each Circuit that has addressed the issue of the continued viability of *Hunter*'s rule has concluded that the rule indeed persists, the Circuits have applied this rule in an inconsistent manner.

As noted above, the Ninth Circuit holds that a political subdivision of a state may not assert *any* constitutional challenges against its state, including challenges under the Supremacy Clause. The Fourth and Fifth Circuits have reached the opposite conclusion and permit political subdivisions to challenge state action under the Supremacy Clause. *See Rogers v. Brockette*, 588 F.2d 1057

---

[9] Justices White and Marshall recognized the inconsistency between the *Hunter* line of cases and *Brown* when they dissented from the Court's decision to deny certiorari in the *South Lake Tahoe* case. 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting).

(5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *School Board v. Baliles*, 829 F.2d 1308 (4th Cir. 1987).[10]

The Sixth and Eleventh Circuits, and the California Supreme Court, have recognized that the *Hunter* rule does not prohibit *all* constitutional challenges to state statutes by political subdivisions. *See South Macomb Disposal Auth.*, 790 F.2d at 504 (recognizing Supremacy Clause exception); *Alabama*, 791 F.2d at 1454 (rejecting contention that political subdivision has no federally protected rights); *Star-Kist*, 719 P.2d at 992 (recognizing Commerce Clause exception). The Third Circuit has recognized that support for the *Hunter* rule is waning. *Amato*, 952 F.2d at 755 ("Judicial support for this rule may be waning with time."). The First, Second, Seventh,

---

[10] The *Rogers* court held that a school district may assert a Supremacy Clause challenge to a state law that required a district with a substantial number of low income students to participate in a federally subsidized school breakfast program. In resolving the standing question, the *Rogers* court studied the historic basis of the "no standing" rule and concluded that the rule has generally been applied in two types of cases: those in which the state has altered political subdivisions' boundaries and those involving state modification of a benefit previously granted to a subdivision. The court stated that "these cases are substantive interpretations of the constitutional provisions involved" and thus simply "adhere to the substantive principle that the Constitution does not interfere with a state's internal political organization." 588 F.2d at 1068, 1070. The court concluded that because no comparable limit on Congress' power to "interfere" in a state's internal political organization exists, a subdivision of the state may raise a claim that state law conflicts with federal law and is therefore void. *Id.* at 1070-71.

Eighth and Tenth Circuits have not expressly addressed this issue.[11]

The Ninth Circuit therefore stands alone in its holding that the *Hunter* rule bars Supremacy Clause challenges by political subdivisions.[12] This conflict and the expressed confusion of the courts make clear that the lower courts need guidance on this very important jurisdictional question and that such guidance can only come from the Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD K. SIMON
McDERMOTT, WILL & EMERY

Attorneys for Petitioner Burbank-Glendale-Pasadena Airport Authority

---

[11] In *Branson Sch. Dist. Re-82 v. Romer*, 958 F. Supp. 1501, 1507-08 (D. Colo. 1997), the district court, lacking guidance from the Tenth Circuit, rejected the Ninth Circuit's *South Lake Tahoe* analysis and adopted the Fifth Circuit's "Supremacy Clause exception."

[12] Without addressing the *Hunter* rule, many lower courts have permitted political subdivisions to maintain Supremacy Clause challenges to state action. *See, e.g., Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992); *Triplett v. Tiemann*, 302 F. Supp. 1239 (D. Neb. 1969); *Carlsbad Union Sch. Dist. v. Rafferty*, 300 F. Supp. 434 (S.D. Cal. 1969); *Douglas Indep. Sch. Dist. No. 3 v. Jorgenson*, 293 F. Supp. 849 (D.S.D. 1968); *Hergenreter v. Hayden*, 295 F. Supp. 251 (D. Kan. 1968).

APPENDIX A

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a joint powers agency, Plaintiff-Appellant, v. CITY OF BURBANK, a municipal corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California, Defendants-Appellees, and STATE OF CALIFORNIA, Intervenor-Defendant-Appellee.

No. 97-55520

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

136 F.3d 1360; 1998 U.S. App. LEXIS 3242; 98 Cal. Daily Op. Service 1440; 98 Daily Journal DAR 1996

December 1, 1997, Argued, Submitted,
Pasadena, California

March 2, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-96-04125-LGB. Lourdes G. Baird, District Judge, Presiding.

DISPOSITION: Motion for judicial notice GRANTED. Judgment of the district court AFFIRMED.

COUNSEL: Jennifer L. Spaziano, Los Angeles, California, for the plaintiff-appellant.

Dana C. Nifosi, Washington, D.C., for the defendants-appellees.

Dennis A. Barlow, City Attorney, City of Burbank, Burbank, California, for the defendants-appellees.

Perry M. Rosen, Cutler & Stanfield, Washington, D.C., for the defendants-appellees.

Susan L. Durbin, Deputy Attorney General for the State of California, Los Angeles, California, for the intervenor-defendant-appellee.

JUDGES: Before: Mary M. Schroeder and Alex Kozinski, Circuit Judges, and Ronald M. Whyte,* District Judge. Opinion by Judge Schroeder; Concurrence by Judge Kozinski.

OPINION BY: MARY M. SCHROEDER

OPINION: OPINION

SCHROEDER, Circuit Judge:

The Burbank-Glendale-Pasadena Airport Authority ("Authority") is engaged in a substantial expansion of terminal and parking facilities for the Burbank Airport. The City of Burbank ("Burbank") is reviewing the acquisition of land for that expansion, pursuant to California Public Utilities Code § 21661.6. The Authority filed this action to block Burbank's review, claiming that Burbank's implementation of the state statute in this case is contrary to federal law, and hence unconstitutional under the Supremacy Clause, as well as other clauses of the United States Constitution.

The problem for the Authority is that it is a political subdivision of the State of California. The district court dismissed the action on the ground that it is barred under our court's decision in *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), which held that a political subdivision of a state lacks

---

* Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

standing under federal law to challenge the constitutionality of a state statute. The Authority appeals, contending the Supreme Court has overruled *South Lake Tahoe* or, in the alternative, that we should recognize an exception to the *South Lake Tahoe* holding. We hold that the Authority's efforts to circumnavigate *South Lake Tahoe*'s broad, per se rule are ultimately unavailing and affirm the district court.

BACKGROUND

The Authority is a "Joint Powers Agency" created by the cities of Burbank, Glendale, and Pasadena pursuant to Cal. Gov't Code § 6500. The Authority is the sole proprietor and operator of the Airport. The Authority wants to acquire approximately 130 acres of property located within Burbank, commonly referred to as the B-6 property, from the Lockheed Martin Corporation for the purpose of constructing a new passenger terminal at the Airport.

In April 1996, pursuant to authority granted by Cal. Pub. Util. Code § 21661.6, Burbank adopted "Procedures for Review by the Burbank City Council of Plan for Expansion of the Burbank-Glendale-Pasadena Airport" ("Review Procedures"). The Review Procedures provide that the Authority's proposed acquisition of the property for the new terminal may not begin until: (1) the Authority submits a plan detailing the proposed uses of the property to the Burbank City Council; (2) the Burbank City Council holds a public hearing on the plan; and (3) the Burbank City Council approves the plan.

In June 1996, the Authority filed this action in federal court against Burbank, seeking to have the statute and the Review Procedures declared unconstitutional, and to have their future enforcement enjoined. The Authority alleged that the statute and the Review Procedures: (1) violated the Supremacy Clause by regulating air safety, an area reserved for federal regulation; (2) violated the Commerce Clause by unduly interfering with or burdening interstate commerce; and (3) violated the Due Process Clause of the Fourteenth Amendment by being impermissibly vague. The Authority further alleged that even if the statute and the Review Procedures are facially valid, Burbank should be prevented from requiring compliance pursuant to the equitable doctrines of waiver and estoppel.

In September 1996, the Authority filed its First Amended Complaint, adding the California Department of Transportation as a party defendant. The Burbank City Council in October 1996 adopted a recommendation of its staff and disapproved of the Authority's expansion of the Airport as proposed, including the plan to acquire the B-6 property.

In April 1997, the district court, relying on *South Lake Tahoe*, entered an order dismissing the Authority's action for lack of standing because the Authority is a political subdivision of the State of California and cannot challenge the constitutionality of the statute and the Review Procedures in federal court. The Authority appeals.

DISCUSSION

The issues raised by the Authority are all issues of law and all relate to whether this court should follow *South Lake Tahoe* in this case.

The Authority's primary contention is that *South Lake Tahoe* and the principles upon which it relied were impliedly overruled by the United States Supreme Court's decision in *Washington v. Seattle School District*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). A divided panel of this court previously rejected this argument in *Indian Oasis-Baboquivari v. Kirk*, 91 F.3d 1240, 1243-44 (9th Cir. 1996) (*"Indian Oasis I "*), *reh'g en banc granted*, 102 F.3d 999 (9th Cir. 1996), *appeal dismissed*, 109 F.3d 634 (9th Cir. 1997) (en banc).

Although *Indian Oasis I* has no precedential value, the arguments on both sides of the issue were thoroughly explored in the panel's opinions. Both the majority and minority discussed the Supreme Court decision in *Seattle School District*. That case concerned a school district's challenge to the constitutionality of a statewide voter initiative concerning school bussing. The Supreme Court upheld the school district's contention that the initiative violated equal protection. Despite the starkness of the Supreme Court's holding on the merits, the Court did not expressly address the question of standing, and thus did not directly consider whether the school district, unquestionably a political subdivision of the state, had standing to bring the action in the first place. We must conclude, as did the majority in *Indian Oasis I*, that *Seattle School District* does not constitute binding authority with respect to

standing. *See United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 97 L. Ed. 54, 73 S. Ct. 67 (1952).

In *Tucker Truck*, the Supreme Court discussed the effect of an opinion where the merits were decided, but jurisdiction was not raised or addressed, on the determination of whether jurisdiction exists when raised in a later case. The *Tucker Truck* court stated:

> The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not binding precedent on this point. Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.

Id., 344 U.S. at 38, 73 S. Ct. at 69.

Relying on *Tucker Truck*, the panel majority in *Indian Oasis I* held that it was bound to follow *South Lake Tahoe*. It stated:

> Given the fact that we have explicit precedent on the point of political subdivision standing, and that the Supreme Court has never directly considered the issue, we cannot say that the weight of its implicit exercise of jurisdiction is sufficiently powerful to undermine the law by which we are bound. We therefore remain obliged to follow *South Lake Tahoe*.

Indian Oasis I, 91 F.3d at 1244.

This court has followed the rationale of *Tucker Truck* in other decisions. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *Sethy v. Alameda*

County Water Dist., 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) ("[T]his Court has never considered itself bound [by prior sub silentio holdings] when a subsequent case finally brings the jurisdictional issue before us.") (citation and internal quotation marks omitted); *Webster v. Fall*, 266 U.S. 507, 510, 69 L. Ed. 411, 45 S. Ct. 148 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."). We find nothing in decisions of the Supreme Court or of this court to question the soundness of those rulings. Accordingly, we hold that *South Lake Tahoe* was not overruled by *Seattle School District*.

The Authority alternatively contends that even if *South Lake Tahoe* is still good law, we should recognize an exception to its holding for claims based on the Supremacy Clause. Several federal courts have apparently stated that, even though there is a general rule against standing on the part of a state subdivision to contest state statutes, standing may nevertheless exist where the state law is interfering with strong federal interests. *See Rogers v. Brockette*, 588 F.2d 1057, 1070-71 (5th Cir. 1979) (permitting Supremacy Clause challenges); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) (suggesting that political subdivisions have standing to sue in some circumstances); *United States v. State of Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) (holding that no per se rule applies); *see also Amato v. Wilentz*, 952 F.2d 742, 754-55 (3d Cir. 1991) (third party standing case that notes general rule as current law, but

acknowledges that support for it may be waning); *City of Charleston v. Public Serv. Comm. of West Virginia*, 57 F.3d 385, 389-90 (4th Cir. 1995) (stating that there is some support for the general rule, but that it has been applied mostly in Fourteenth Amendment cases, and that its expansiveness is in doubt).

This court, however, has not recognized any exception to the per se rule, and the broad language of *South Lake Tahoe* appears to foreclose the possibility of our doing so. *See South Lake Tahoe*, 625 F.2d at 233 ("political subdivisions" of a state lack standing to challenge statutes of the state itself, or one of its political subdivisions, on "constitutional grounds"). Indeed, the complaint in *South Lake Tahoe* included a Supremacy Clause claim, as well as violations of the Fifth and Fourteenth Amendments. *See id.* at 233. Accordingly, we must reject the contention that we should create such an exception at this point.

Finally, the Authority contends that because Burbank is a charter city, rather than a general law city, it is not a political subdivision of the state for purposes of its ability to challenge a state statute. The Authority relies upon Supreme Court holdings that subdivisions of the state are creations of state law and have the authority conferred upon them by state law. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 177, 52 L. Ed. 151, 28 S. Ct. 40 (1907). *See also City of Trenton v. New Jersey*, 262 U.S. 182, 187, 67 L. Ed. 937, 43 S. Ct. 534 (1923) ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit."); *United Building and Construction Trades Council of Camden*

County v. City of Camden, 465 U.S. 208, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984).

We do not believe these cases are dispositive of the federal standing issue before us. None were brought by a governmental or quasi-governmental entity. Moreover, charter cities in California generally are defined as political subdivisions along with other governmental entities. *See, e.g.*, Cal. Pub. Util. Code § 21010 (State Aeronautics Act governing airport operations in California, which defines a political subdivision as "any county, city, city and county, public corporation district or other political entity or public operation of the state"). *See also* Cal. Pub. Util. Code § 21690.6 ("The provisions of this article shall apply to any airport owned or operated by a political subdivision, including a charter city.").

We must deal with one further administrative matter. The City of Burbank has moved this court to take judicial notice of pleadings filed in a related state court action, *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, No. EC022341 (Superior Court of the State of California). This state case was filed by Burbank after the district court entered its order of dismissal. The parties at argument informed this court that the state court action is proceeding pursuant to California state law, which permits challenges of political subdivisions to the constitutionality of state enactments under certain circumstances. *See Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 719 P.2d 987, 992, 227 Cal. Rptr. 391 (Cal. 1986). The motion for judicial notice is GRANTED.

The judgment of the district court is AFFIRMED.

CONCUR BY: ALEX KOZINSKI

CONCUR: KOZINSKI, Circuit Judge, concurring.

I join Judge Schroeder's opinion but write briefly to address appellant's suggestion that we reconsider *South Lake Tahoe,* at least insofar as it denies state instrumentalities standing to raise constitutional claims based on the Supremacy Clause. While we are bound by the law of the circuit, the fact that three other circuits seem to have recognized an exception to the per se rule of *South Lake Tahoe, see maj. op.* at 1681, might be a reason to reconsider the matter en banc. *See, e.g., United States v. Jose,* 131 F.3d 1325, 1997 WL 778255 (9th Cir. 1997) (en banc).

Unfortunately, the cases from the other circuits do not merit emulation. Supremacy Clause claims do differ from other constitutional claims in this respect: Most constitutional claims pit the individual against the power of the government, while Supremacy Clause claims protect the interests of the federal government against encroachment by the states. Appellants argue that even if state instrumentalities do not have personal rights, like those protected by the Bill of Rights, they are surely able to promote federal interests by litigating federal preemption claims against the state.

I am not so sure. A federal preemption claim, after all, asserts the supremacy of federal law over state law. Congress is free to exercise its powers under the Supremacy Clause, but can it conscript state instrumentalities to aid in destruction of the state's laws? Suppose Congress passes a statute and empowers the state's Attorney General to bring suit to set aside any state law inconsistent

therewith. Since the Attorney General's responsibility is to enforce the laws of the state, is it consistent with his duties to task him with having some of those laws set aside? Or, what if Congress bestows that power on a member of the Governor's cabinet, such as the Secretary of Transportation? Can Congress drive a wedge between the Governor and a member of his cabinet by giving that official federal powers that conflict with his responsibilities as the Governor's political appointee? There is a plausible argument that Congress may not interfere with the functioning of state officials and instrumentalities by endowing them with powers and duties that conflict with their responsibilities under state law. *Cf. Printz v. United States*, 138 L. Ed. 2d 914, 117 S. Ct. 2365, 2381 (1997) ("It is no more compatible with this independence and autonomy that [States'] officers be 'dragooned' (as Judge Fernandez put it in his dissent below) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.") (citation omitted).

How far such a limitation extends – if it exists at all – is something that bears thinking about. None of the circuits that have rejected *South Lake Tahoe* have considered the question, and neither have the parties before us. The issue deserves exploration before we carve out a Supremacy Clause exception to *South Lake Tahoe*. I am therefore content to await such reconsideration if and when a case arises where the question is given appropriate attention.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a Joint Powers Agency, Plaintiff, v. CITY OF BURBANK, a municipal Corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California, Defendants, STATE OF CALIFORNIA, Intervenor-Defendant, AND RELATED COUNTERCLAIMS.	CV 96-4125 LGB (SHx) ORDER DISMISSING CASE

(Filed March 31, 1997)

I. INTRODUCTION

The three cross-motions for summary judgment of (1) Plaintiff Burbank-Glendale-Pasadena Airport Authority ("the Authority"); (2) defendant City of Burbank ("Burbank"); and (3) defendant James van Loben Sels, Director

of the California Department of Transportation ("DOT"),[1] and intervenor-defendant the State of California (the "State") (collectively the "State Defendants"), as well as Burbank's Motion for Leave to File Declaration of Richard W. Danforth, came on regularly for hearing on March 31, 1997.

In their summary judgment motions, Burbank and the State Defendants have raised the issue of the Authority's standing to bring this action. Accordingly, the Court hereby CONSTRUES the portions of Burbank's Motion for Summary Judgment and the State Defendants' Motion for Summary Judgment that address the Authority's standing to sue as Motions to Dismiss under Federal Rule of Civil Procedure ("Rule") 12(h) (3). Having reviewed all pertinent papers on file and considered the oral argument of counsel, the Court concludes that the Authority lacks standing to bring the instant action. Accordingly, the Court GRANTS the Motions to Dismiss and DISMISSES this case. The Court also finds that the remaining motions are MOOT.

II. BACKGROUND

This action arises out of a dispute between the Authority and Burbank over a planned expansion of the Burbank-Glendale-Pasadena Airport ("the Airport") and the proposed acquisition of certain land in Burbank for that expansion.

---

[1] Because van Loben Sels is sued in his official capacity the Court will hereinafter refer to DOT in his place.

The following facts are undisputed, except as otherwise noted.[2] The Court here sets out only those facts pertinent to the issue of the Authority's standing to sue.

The Authority is a "Joint Powers Agency" created by the cities of Burbank, Glendale, and Pasadena pursuant to California Government Code sections 6500 *et seq.* (Burbank's Genuine Issues ¶ 1.) The Authority is the sole proprietor and operator of the Airport. (*Id.* ¶ 2.) The Authority proposes to acquire approximately 130 acres of property located within Burbank, commonly referred to as the B-6 property, from the Lockheed Martin Corporation ("Lockheed Martin") for the purpose of constructing a new passenger terminal at the Airport. (Authority's Genuine Issues ¶ 3.)

Burbank is a municipal corporation of the State of California. (Authority's Genuine Issues ¶ 2.) Burbank contends that, pursuant to California Public Utilities

---

[2] This factual summary draws on the following: (1) the Authority's Statement of Uncontroverted Material Facts and Conclusions of Law ("Authority's Uncontroverted Facts"); (2) Burbank's Statement of Genuine Issues of Material Fact ("Burbank's Genuine Issues"), in which the State Defendants join, in response; (3) Burbank's Statement of Uncontroverted Material Facts and Conclusions of Law ("Burbank's Uncontroverted Facts"), in which the State Defendants join; and (4) the Authority's Statement of Genuine Issues of Material Fact ("Authority's Genuine Issues") in response.

Code section 21661.6 ("the Statute"),[3] the Authority must obtain approval from Burbank before acquiring the B-6 property. (Burbank's Genuine Issues ¶ 17.)[4]

---

[3] The Statute, which is entitled "Submission of plan for expansion or enlargement of airport," provides that

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.
>
> (b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.
>
> (c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.
>
> (d) Upon approval of the plan, the proposed acquisition of property may begin.
>
> (e) The use of property so acquired shall thereafter conform to the approved plan, and any such variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.
>
> (f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

Cal. Pub. Util. Code § 21661.6 (West 1994).

[4] It is undisputed that Burbank *contends* this. It is very much in dispute, however, whether the Authority is actually required to obtain such approval.

In April 1996, pursuant to the authority granted by the Statute, Burbank adopted "Procedures for Review by the Burbank City Council of Plan for Expansion of the Burbank-Glendale-Pasadena Airport" ("the Review Procedures"). (Burbank's Genuine Issues ¶ 18.) Burbank's Review Procedures provide that the Authority's proposed acquisition of the property for the new terminal, which includes the B-6 property, may not begin until: (1) the Authority submits a plan detailing the proposed uses of the property to Burbank; (2) Burbank holds a public hearing on the plan; and (3) Burbank subsequently approves the plan. (Authority's Smith Decl. Ex. 3 (the Review Procedures) at 6.)[5]

On June 11, 1996, the Authority filed its initial Complaint against Burbank, seeking to have the Statute and the Review Procedures declared unconstitutional and to have their future enforcement enjoined. The Authority

---

[5] The Review Procedures provide for approval by the Burbank City Council of the expansion plan if the City Council finds that:

> (1) The advantages to the public of the proposed expansion outweigh the disadvantages to both the public and the environment. Environmental factors to be considered include noise, air pollution, and the burden on surrounding areas, including traffic.
>
> (2) Approval of the Expansion Plan is consistent with the objective of adopting land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses.

(*Id.* at 13.)

alleged that the Statute and the Review Procedures (1) violate the Supremacy Clause, U.S. Const. art. VI, cl. 2, by purporting to regulate in the area of air safety, a matter reserved for federal regulation; (2) violate the Commerce Clause, U.S. Const. art. I, § 8, by unduly interfering with or burdening interstate commerce; and (3) violate the Authority's right to Due Process as guaranteed by the Fourteenth Amendment, because the Statute and the Review Procedures are unconstitutionally vague. The Authority further alleged that even if the Statute and the Review Procedures are facially valid, Burbank should be prevented from requiring compliance therewith by the equitable doctrines of waiver and estoppel.

On August 7, 1996, the Authority commenced an action against Lockheed Martin in Los Angeles County Superior Court to condemn the B-6 property ("the Condemnation Action"), *Burbank-Glendale-Pasadena Airport Auth. v. Lockheed Corp. et al.*, LASC Case No. BC 155222. (*See* Szczepkowski Decl. Supp. Counterclaim Def. Lockheed Martin's Req. Jud. Not. ¶ 2 & Ex. A (copy of the Complaint in that action).)

On September 16, 1996, Judge Wardlaw, in whose court this case was originally filed, granted Plaintiff's motion for leave to file an amended complaint, and granted the State leave to intervene. On September 17, 1996, Plaintiff filed its First Amended Complaint, adding DOT as a party defendant.

On September 30, 1996, Burbank answered the First Amended Complaint and counterclaimed against the Authority and Lockheed Martin. By its counterclaims, Burbank seeks, in essence, to enjoin the Authority from

acquiring land within Burbank without the approval of the Burbank City Council, and to enjoin the Authority and Lockheed Martin from transferring the B-6 property without similar approval. Burbank also seeks declaratory judgments that the Authority must obtain the Burbank City Council's approval prior to acquiring an interest in land in Burbank, and that the Authority and the FAA are on notice of Burbank's objection to any expansion of the Airport within Burbank.

On October 3, 1996, the State answered on behalf of DOT.

On October 15, 1996, pursuant to the Statute and the Procedures, the Burbank City Council adopted the recommendation of its Staff and disapproved the Authority's terminal project as proposed, including the plan to acquire the B-6 property. (Burbank's Genuine Issues ¶ 20 & Authority's Genuine Issues ¶ 29.)

On November 12, 1996, Lockheed Martin moved to dismiss Burbank's counterclaims as against Lockheed Martin.

The case was transferred from Judge Wardlaw to this Court on November 21, 1996.

On November 26, 1996, the Authority answered Burbank's counterclaims.

By Order entered January 16, 1997, this Court granted Lockheed Martin's Motion to Dismiss the counterclaims.

The Authority has stated that on March 6, 1997, in the Condemnation Action, the Los Angeles Superior Court

granted the Authority's Motion for An Order of Possession. (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 1-2.) Pursuant to that order, the Authority alleges, the Authority is entitled to take possession of the B-6 property on or about June 3, 1997. (*Id.* at 2.)

III. THE AUTHORITY'S STANDING

Burbank and the State Defendants have raise [sic] the threshold issue of whether the Authority has standing to bring this action. They contend that the Authority is a political subdivision of the State of California and therefore lacks standing to challenge a statute enacted by the State or an ordinance enacted by another political subdivision of the State in federal court on the ground that the statute or ordinance violates any provision of the federal constitution, including the Supremacy Clause. (Burbank's Mem. Supp. Mot. Summ. J. at 9, 15-17; State Defendants' Mem. Supp. Mot. Summ. J. at 8-9.)

A. LEGAL STANDARDS

Standing is a necessary element of federal court jurisdiction. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). "A threshold question in every federal case is, therefore, whether at least one plaintiff has standing." *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency,* 625 F.2d 231, 233 (9th Cir.), *cert. denied,* 449 U.S. 1039 (1980). The plaintiff's lack of standing cannot be waived by the parties, and must be examined by the court. *United States v. Hays,* ___ U.S. ___, 115 S. Ct. 2431, 2435 (1995).

In *South Lake Tahoe*, the City of South Lake Tahoe and its mayor and members of its city council brought a federal action against the California Tahoe Regional Planning Agency (the "CTRPA") and four of its members for injunctive and declaratory relief. 625 F.2d at 232. The plaintiffs alleged that certain regulations adopted by the CTRPA and actions taken by that body were unconstitutional, that they violated several provisions of the federal constitution: the Fifth and Fourteenth Amendments, the right to travel inherent in the Constitution, and the Supremacy Clause. *Id.* at 232-33.[6] The district court dismissed on the ground that federal courts should, as a matter of discretion, abstain from exercising jurisdiction in cases where the federal constitutional claims that support jurisdiction would be mooted or altered by a state court interpretation of state law. *Id.* at 232. The court did not reach the question of standing. *Id.*

The Ninth Circuit affirmed but, with regard to the City, did so on the ground of lack of standing. The court noted that "[i]t is well established that 'political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' " *Id.* at 233 (quoting *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973)). "This is true whether the defendant is the state itself or another of the state's political subdivisions." *South Lake Tahoe*, 625 F.2d at 233. The court then held that the City of South Lake

---

[6] The basis for the Supremacy Clause claim was that the CTRPA's actions conflicted with the plans and ordinances of a bi-state administrative body established by California and Nevada and approved by Congress. *Id.* at 233.

Tahoe, as a political subdivision of the State of California, lacked standing to challenge the CTRPA's plans and ordinances on constitutional grounds in federal court. *Id.*[7]

---

[7] In *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240 (9th Cir. 1996) (*Indian Oasis I*), two Arizona public school districts and several of their students brought suit in federal court against the Arizona Superintendent of Public Instruction and the county treasurers and school superintendents of Prima and Navajo counties. *Id.* at 1241. The plaintiffs sought injunctive and declaratory relief holding that an Arizona educational funding statute violated a federal education funding law and, therefore, violated the Supremacy Clause of the federal constitution. *Id.* The district court dismissed as to all plaintiffs for lack of standing. *Id.*

On appeal, the Ninth Circuit initially affirmed on the merits the district court's ruling on the school district's standing. *Id.* at 1244. The appellate court indicated that it was bound [sic] do so by *South Lake Tahoe. Indian Oasis I*, 91 F.3d at 1244. Although it evidently was not convinced of the correctness of *South Lake Tahoe*, it nevertheless considered that case to be controlling authority. *Indian Oasis I*, 91 F.3d at 1243.

Subsequently, however, the Ninth Circuit granted rehearing of *Indian Oasis I* en banc. On rehearing, the court issued a new opinion holding that it lacked jurisdiction to hear the appeal, and dismissed the appeal. *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, ___ F.3d ___, No. 93-16089, 1997 WL 131988, at *1, 97 Daily Journal D.A.R. 3913 (9th Cir. Mar. 25, 1997) (*Indian Oasis II*). The court did not address the standing issues on which the original panel had initially relied. Thus, it appears that the earlier Ninth Circuit opinion in *Indian Oasis I* is not, formally, binding law. However, that opinion is still persuasive that *South Lake Tahoe* continues to be valid, controlling law.

B. APPLICATION

The Authority seeks to avoid dismissal of this entire action on two general grounds. First, it argues that it has standing. Second, and in the alternative, it argues that even if it lacks standing, the Court should still retain and address Burbank's counterclaims.

1. The Authority's Standing

The Authority attempts to avoid the application of the *South Lake Tahoe* standing rule to it on two grounds: (1) neither itself nor Burbank is a "political subdivision" of the State of California; and (2) the rule does not bar a political entity from challenging the constitutionality of an ordinance enacted by a "charter city." (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 3-6.)

a. The Status of the Authority

In *South Lake Tahoe,* the Ninth Circuit held that an entity which it called a "city" was a "political subdivision" for the purposes of the rule which bars political subdivisions from raising constitutional challenges to state statutes or local ordinances in federal court. As noted above, that decision governs the case at bar.

The Authority, however, seeks to avoid the *South Lake Tahoe* standing rule by drawing a distinction between "non-charter" cities and "charter" cities. The Authority claims that "non-charter" cities are "political subdivisions" of the State, while "charter" cities are not. Therefore, it claims, "non-charter" cities are subject to the *South*

Lake Tahoe rule, while "charter" cities are not. Then, through a leap made without clear explanation and wholly without legal authority, the Authority reaches the conclusion that it stands in the position of a charter city and so is itself not subject to *South Lake Tahoe*.

Nothing in *South Lake Tahoe* supports the distinction the Authority attempts to draw. The Authority refers to the City of South Lake Tahoe as an example of a "non-charter city." However, as Burbank and the State Defendants point out, the *South Lake Tahoe* court, in holding that the plaintiff city lacked standing, did not refer to South Lake Tahoe as either a "charter" or "non-charter" city. Instead, the Ninth Circuit simply held that the city in that case lacked standing to sue. The Authority's argument, in other words, is groundless.

In another rather convoluted attempt to manufacture standing, the Authority also cites to two early California Supreme Court cases that address the status of various political entities in California. In *Los Angeles County v. Riley*, 6 Cal. 2d 625, 59 P.2d 139 (1936), the court was faced with a dispute between a county and the state over whether certain tax funds collected by the state and appropriated to the counties could be used only for "state purposes." Consequently, the court focused on the differences and overlap between the functions performed by states, counties, and cities. *Id.* at 628. The court drew a distinction between counties, which it identified as political subdivisions, and municipal corporations: "Counties are not municipal corporations, but are political subdivisions of the state for purposes of government." *Id.*

In *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 326 P.2d 484 (1958), retired city employees sought to recover the difference in pension payments between what they would have received under one payment scheme and what they actually received under a later-implemented payment scheme. The later scheme was put in place through amendments to the city charter. *Id.* at 446. The court held for the plaintiffs, concluding that the charter amendments were not applicable to the plaintiffs. *Id.* at 455. The court addressed the definition of "political subdivision" in connection with the issue of the interest on the unpaid balances due the plaintiffs. The relevant statute specifically permitted recovery of interest from "political subdivisions of the State" which were judgment debtors. *Id.* at 466. The court concluded that a municipal corporation, in contrast to a county, was not a "political subdivision of the State" for purposes of that interest statute, and denied plaintiffs the interest recovery. *Id.* at 467-68. In so concluding, the court cited an earlier California Supreme Court case which had declared that " '[a] county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government,' " *Id.* at 467 (quoting *County of San Mateo v. Coburn*, 130 Cal. 631, 636, 63 P. 78 (1900)).

However, these sources do not support the Authority's position in this case. The Authority does not exercise functions that can fairly be called "local," and so is not helped by *Abbott* and *Riley*. Those cases based the distinction between counties and municipal corporations, for

purposes of the statutes at issue in each case, in significant part on the local character of the functions performed by municipal corporations, in contrast to the way counties operate to implement state functions. *See Abbott*, 50 Cal. 2d at 467; *Riley*, 6 Cal. 2d at 627-28. The Authority, however, was created as a joint powers public agency pursuant to a state statute, Cal. Gov't Code § 6546.1 (West 1995) (providing for creation of a joint powers public agency to own and operate the Airport), and performs functions better characterized as "state," or even interstate, rather than "local." That characterization is further supported by the provision in the joint powers legislation that permits the "public agencies" to be formed through joint agreements entered into by California political entities with entities from outside of California. *See id.* § 6502 (West 1995).

In addition, as the State Defendants note, elsewhere in California law entities like Burbank and like the Authority itself are specifically included in the definition of "political subdivision." One example is the California State Aeronautics Act, which regulates certain aeronautics activities and is thus far closer in subject matter to the case at bar than the statutes at issue in *Riley* and *Abbott*. The Aeronautics Act defines "political subdivision" to mean "any county, city, city and county, public corporations, district or other political entity or public corporation of this State." Cal. Pub. Util. Code § 21010 (West 1994). Other provisions of the Act contemplate that the term includes entities like the Authority. *See, e.g., id.* § 21207 (West 1994) (referring to "political subdivision[s] owning and operating airport[s]").

In short, the Court finds that the Authority is a political subdivision for purposes of the standing rule set out in *South Lake Tahoe*, and so is subject to that rule.

b. Challenging a Charter City's Ordinance

The Authority also contends that the *South Lake Tahoe* rule "does not bar a political entity from challenging the constitutionality of an ordinance enacted by a charter city." (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 3.) Although the reasoning the Authority sets out is somewhat opaque, the Authority argues that the rule is predicated on the assumption that a "political subdivision" is a "creature of the state" and a subordinate political entity. *Id.* The Authority seems to argue that even if it lacks standing to bring a federal action against the State challenging a state statute on constitutional grounds, it nevertheless has standing to bring a federal action against an entity other than the State itself to challenge an ordinance passed by that entity. In other words, even if in this forum the Authority cannot challenge the Statute, it can still challenge the Review Procedures.

However, the Authority cites to no direct authority for this argument, but instead cobbles it together from various unrelated case law and statutory sources. As with the Authority's effort to distinguish charter cities from non-charter cities, here nothing in *South Lake Tahoe* suggests the distinction the Authority attempts to draw. Indeed, there the Ninth Circuit specifically stated that a political subdivision of a state may not challenge a state statute in federal court on constitutional grounds,

whether the defendant is the state itself or another political subdivision of the state. *South Lake Tahoe*, 625 F.2d at 233. The court then specifically held that the plaintiff city lacked standing to challenge the *"plans and ordinances"* of another political subdivision of the state on constitutional grounds in federal court. *Id.* (emphasis added). As discussed above, there is no basis for considering either the Authority or Burbank to be anything other than a political subdivision, at least for purposes of the *South Lake Tahoe* standing rule. There is also no basis for distinguishing the Review Procedures from the plans and ordinances at issue in *South Lake Tahoe*. Accordingly, this argument too must be rejected.

In sum, the Court finds that the Authority lacks standing to bring the instant action. The Court therefore DISMISSES the Authority's suit.

2. Jurisdiction over Burbank's Counterclaims

In the alternative to arguing that it has standing, the Authority argues that the Court has jurisdiction over, and should, proceed to the merits of, Burbank's counterclaims.

The Authority contends, without citation to legal authority, that a municipality, whether or not a political subdivision, can bring a suit in federal court to enforce, as opposed to, challenge, its own local ordinances and state statutes. (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 5.) It follows, the Authority argues, that even if the Authority lacks standing to bring the underlying

action, the Court may still proceed to rule on Burbank's counterclaims. (*Id.* at 6.)

In the present case, Burbank has counterclaimed against the Authority seeking: (1) to enjoin the Authority from acquiring land within Burbank without the approval of the Burbank City Council, and to enjoin the Authority and Lockheed Martin from transferring the B-6 property without similar approval; and (2) declaratory judgments that the Authority must obtain the Burbank City Council's approval prior to acquiring an interest in land in Burbank, and that the Authority and the FAA are on notice of Burbank's objection to any expansion of the Airport within Burbank.

The State Defendants argue that the validity of Burbank's counterclaims, as counterclaims, does not give the Court jurisdiction over the Authority's underlying action. (State Def.s' Reply at 8.) The State Defendants, through their arguments against the Authority having standing, appear to concede that Burbank would be barred by *South Lake Tahoe* from bringing its counterclaims as an independent action in federal court. They are nevertheless valid *counterclaims,* the State Defendants contend, because a counterclaim does not require an independent basis of federal subject matter jurisdiction. *Id.* at 8-9 (citing Fed. R. Civ. P. 13(a)). Indeed, they maintain, here the counterclaims do *not* have an independent basis for jurisdiction. *Id.* at 9 ("Burbank's compulsory counterclaims, therefore, pose *no* federal question triggering the jurisdiction of this Court.") (emphasis in original). Instead, the Court's jurisdiction over the counterclaims is dependent upon the existence of jurisdiction over the Authority's underlying action. *Id.*

Rule 8 provides, in pertinent part, that "[a] pleading which sets forth a claim for relief, whether an original claim [or] counterclaim . . . shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." Fed. R. Civ. P. 8(a). A counterclaim need not have an independent basis for jurisdiction in order to be valid. Rule 13(a) provides, in pertinent part, that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). However, where the counterclaim does not have an independent federal jurisdictional basis and the underlying complaint is dismissed, the counterclaim must also be dismissed. *DHL Corp. v. Loomis Courier Serv., Inc.*, 522 F.2d 982, 985 (9th Cir. 1975) ("None of these counterclaims has an independent federal jurisdictional basis. They, therefore, cannot stand following dismissal of the complaint.") (footnote omitted).

In the case at bar, the Court has dismissed the underlying action for lack of jurisdiction due to the Authority's lack of standing. The Court also finds that Burbank's counterclaims do not raise a federal question, the only potential independent basis for federal jurisdiction over the counterclaims.[8] There is thus no independent basis

---

[8] It is true that Burbank has moved for summary judgment that the Statute and the Review Procedures are not preempted by federal law and do not violate federal due process. The fact

for jurisdiction over the counterclaims. Therefore, the counterclaims must be, and hereby are, DISMISSED.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Authority lacks standing to sue, and DISMISSES this case, including Burbank's counterclaims, pursuant to rule 12(h) (3). Consequently, the Court finds that the remaining motions are MOOT.

IT IS SO ORDERED.

Dated: March 31, 1997

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States
District Judge

---

of so moving, however, is not sufficient to establish jurisdiction over the counterclaims themselves. Burbank was seeking summary judgment on issues raised by the Authority in the Authority's pleadings, rather than on its own counterclaims. The plain language of Rule 8(a) makes clear that, in order for a court to have jurisdiction over a counterclaim separate from the underlying action, the counterclaim itself must assert an independent basis for jurisdiction. Burbank's counterclaims, however, do not do so.

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a joint powers agency, Plaintiff-Appellant, v. CITY OF BURBANK, a municipal corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of transportation of the State of California, Defendants-Appellees, and STATE OF CALIFORNIA, Intervenor-Defendant-Appellee.	No. 97-55520 DC No. CV-96-04125-LGB (Central California) ORDER

(Filed Apr. 14, 1998)

Before: SCHROEDER and KOZINSKI, Circuit Judges, and WHYTE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

*Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 98-124

FILED
AUG 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK, CALIFORNIA
A Municipal Corporation,

JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California,

STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT CITY OF BURBANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS A. BARLOW
TERRY B. STEVENSON
City of Burbank, California
275 East Olive Avenue
Burbank, California 91510
(818) 238-5700

**Counsel of Record*

PERRY M. ROSEN*
DANA C. NIFOSI
CUTLER & STANFIELD, LLP
700 Fourteenth Street, NW
Tenth Floor
Washington, D.C. 20005
(202) 624-8400

Attorneys for Respondent City of Burbank

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a political subdivision of a state, which already has pursued to conclusion a claim in state court that a state statute is preempted by federal law, also has standing to pursue the identical claim in federal court against the state and another political subdivision?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Burbank-Glendale-Pasadena Airport Authority was the Plaintiff in the United States District Court for the Central District of California, and was the Appellant in the United States Court of Appeals for the Ninth Circuit.

Respondents City of Burbank and James van Loben Sels were defendants in the United States District Court for the Central District of California, and were Appellees in the United States Court of Appeals for the Ninth Circuit.

Respondent State of California intervened as a defendant in the United States District Court for the Central District of California, and was an Appellee in the United States Court of Appeals for the Ninth Circuit.[1]

---

[1] Hereinafter, this brief refers to Respondents James van Loben Sels and the State of California collectively as the "State".

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Project at Issue: The Terminal Expansion Plan 2

B. The Proceedings Below 4

C. The Related State Court Action 6

ARGUMENT IN OPPOSITION TO PETITION 8

I. THE PETITION SEEKS ONLY AN ADVISORY OPINION, BECAUSE THE AIRPORT AUTHORITY HAS AVAILED ITSELF OF A STATE JUDICIAL FORUM, FULLY LITIGATED ITS SUPREMACY CLAUSE CLAIM, AND OBTAINED RELIEF FROM ENFORCEMENT OF SECTION 21661.6 8

A. Petitioner Seeks Review Of An Issue That Was Not Decided Below 8

TABLE OF CONTENTS – Continued

Page

B. Petitioner Seeks An Advisory Opinion, Because It Already Has Received Complete Relief 11

II. THE DECISIONS OF THE COURT ARE NOT IN CONFLICT 13

III. SINCE THE COURT DENIED THE PETITION FOR A WRIT OF CERTIORARI IN *SOUTH LAKE TAHOE*, THERE HAS BEEN NO CONFLICT IN THE CIRCUITS OVER THE STANDING ISSUE 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 11

Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991) 19

Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997) 12

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989) 10, 16, 20

Baker v. Carr, 369 U.S. 186 (1962) 14

Board of Education v. Allen, 392 U.S. 236 (1968) 13, 15, 16

Board of Education v. Allen, 20 N.Y.2d 109 (1967) 16

Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992) 7

City of Burbank v. Lockheed, 411 U.S. 624 (1973) 7

City of New York v. Richardson, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) 20

City of Newark v. State of New Jersey, 262 U.S. 192 (1923) 15

City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) 18, 19, 21, 22

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 12

Housing Auth. of Kaw Tribe of Indians v. City of Poncha City, 952 F.2d 1183 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1992) 20

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 13, 14, 15, 16, 17, 21

TABLE OF AUTHORITIES – Continued

Page

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997) 11

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985) 16, 17, 18

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 12

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 12

Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) 21, 22

School Board v. Baliles, 829 F.2d 1308 (4th Cir. 1987) 19, 20

South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 19

Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1 (1986) 10

Trenton v. New Jersey, 262 U.S. 182 (1923) 13, 14, 15, 16

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 17

United States v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986) 19

Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) 15, 16, 17

Williams v. Baltimore, 289 U.S. 36 (1933) ..13, 14, 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 8 5

U.S. Const., art. VI, cl. 2 ..... 1, 5

U.S. Const., amend. XIV, § 1 5

STATE STATUTES

Cal. Gov't Code § 6500, *et seq.* 3

Cal. Gov't Code § 6546.1 3

Cal. Code Civ. Proc. § 394 9

Cal. Pub. Util. Code § 21661.6 ..... *passim*

OPINIONS BELOW

The Petition for a Writ of Certiorari accurately reflects the opinion of the United States Court of Appeals for the Ninth Circuit and the order of the District Court for the Central District of California, which are located in Appendices A and B to the Petition. Respondent City of Burbank notes that the order of the Ninth Circuit denying Appellant's petition for rehearing, which is set forth in Appendix C to the Petition, also rejected Appellant's suggestion for rehearing en banc.

JURISDICTIONAL STATEMENT

The Petition for a Writ of Certiorari accurately reflects the basis for jurisdiction in this Court.

STATUTORY PROVISIONS INVOLVED

The Petition for a Writ of Certiorari accurately states that this case involves the Supremacy Clause, U.S. Const., art. VI, cl. 2. This case also involves California Public Utilities Code Section 21661.6, which provides:

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of property may begin.

(e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.

(f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

STATEMENT OF THE CASE

Supplementation and clarification of Petitioner's Statement of the Case is necessary to a full understanding of the facts material to the Court's consideration of the Petition for a Writ of Certiorari ("Petition").

A. The Project at Issue: The Terminal Expansion Plan

The Burbank-Glendale-Pasadena Airport (the "Airport") is located primarily within the jurisdiction of

Respondent City of Burbank ("Burbank" or the "City"), with a small portion located in the city of Los Angeles. Petitioner Burbank-Glendale-Pasadena Airport Authority ("Airport Authority" or the "Authority") has owned and operated the Airport since 1978.[2]

The present controversy between the Airport Authority, Burbank and the State relates to the Airport Authority's plan (the "Terminal Expansion Plan") to acquire approximately 130 acres of land (known as the "B-6 Property") within Burbank on which it proposes to construct a massive new passenger terminal – one that will result in a doubling of the number of aircraft gates, a tripling of the passenger capacity, and a quadrupling of the on-site parking capacity at the Airport. Simply stated, California Public Utilities Code Section 21661.6 ("Section 21661.6"), which is set forth above, requires the approval of the City of Burbank before the Airport Authority can acquire the property designated for its Terminal Expansion Plan.

In March 1996, the Airport Authority submitted its Terminal Expansion Plan to Burbank for its review in accordance with Section 21661.6. In response thereto the City adopted procedures to review the Terminal Expansion Plan (the "Review Procedures"). Over the next

---

[2] In 1976, the California Legislature amended the California Joint Powers Act, Cal. Gov't Code § 6500, *et seq.*, to include Section 6546.1, which authorized the creation of a joint powers agency specifically to own and operate the Airport. Acting pursuant to Section 6546.1, Burbank and the neighboring cities of Glendale and Pasadena, California, entered into a Joint Powers Agreement creating the Airport Authority. *Id.*

several months Burbank staff conducted an exhaustive review of the Terminal Expansion Plan and Burbank's City Council held public hearings on the Plan.

Pursuant to its review, on October 15, 1996, the Burbank City Council disapproved the Terminal Expansion Plan on the basis of numerous significant adverse impacts of the project, including:

- deterioration in police, fire, and emergency services;
- increased traffic congestion;
- deterioration in air quality and the noise environment;
- loss of buildings of potential historic significance;
- adverse effects on school-safe zones;
- interference with the removal of hazardous waste from the City's soil and water;
- the loss of over $2 million in property tax revenues; and
- the need to finance costly infrastructure improvements, including $15 million in roadway improvements.

B. The Proceedings Below

On June 11, 1996, while the Burbank City Council was reviewing the Terminal Expansion Plan submitted by the Airport Authority, the Authority filed against the City of Burbank the lawsuit in the United States District Court for the Central District of California ("District Court")

that is the subject of this Petition. The Airport Authority subsequently joined James van Loben Sels in his official capacity as Director of the California Department of Transportation as a defendant, and the State of California intervened as a defendant. The centerpiece of the Airport Authority's federal action was the claim that Section 21661.6 and Burbank's Review Procedures are preempted by federal aviation statutes and, therefore, violate the Supremacy Clause, U.S. Const., art. VI, cl. 2.[3]

On January 21, 1997, the Airport Authority moved the District Court for summary judgment. Burbank and the State filed cross-motions for summary judgment on the grounds, *inter alia*, that the Airport Authority lacked standing to bring its claims. On March 31, 1997, the District Court dismissed the Airport Authority's action, holding that as a political subdivision of the State of California, it lacked standing in federal court to sue the State and Burbank over the constitutionality of a state statute. The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirmed the dismissal on the same basis.

---

[3] In addition, the Airport Authority alleged that Section 21661.6 and the Review Procedures violate the Commerce Clause, U.S. Const., art. I, § 8, and the Due Process Clause, U.S. Const., amend. XIV, § 1, and that under California law, Burbank has waived its right to enforce Section 21661.6 or otherwise is estopped from enforcing the statute against the Airport Authority.

C. The Related State Court Action

After the District Court dismissed the Airport Authority's federal case, Burbank filed an action in California Superior Court for the County of Los Angeles ("Superior Court"), styled *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, Case No. EC 022341 (the "State Court Action"). That lawsuit sought to enjoin the Airport Authority from proceeding with the acquisition of the B-6 Property without first obtaining Burbank's approval pursuant to Section 21661.6. The State intervened in the State Court Action, asserting similar claims.

On July 23, 1997, the Airport Authority filed a cross-complaint in the State Court Action, which set forth the same constitutional and state law claims that it originally brought in the District Court. The Authority's cross-complaint also alleged a new state law claim not raised in its federal action: that Burbank had, through the contract creating the Airport Authority (*see* note 2, *supra*), delegated to the Airport Authority the right to enforce Section 21661.6.[4] Thus, with the exception of the new delegation claim, the Airport Authority's cross-complaint in the State Court Action raised the identical federal constitutional claims against the identical parties (Burbank and the State) as it raised in its federal action.

---

[4] Burbank requested that the Ninth Circuit take judicial notice of Burbank's complaint and the Airport Authority's cross-complaint. The Ninth Circuit granted that request. *See* Petition, App. A at A-9.

On November 18, 1997, the Superior Court ruled on the cross-motions of all of the parties for summary judgment or summary adjudication of the federal issues raised by the Airport Authority's cross-complaint, including its federal preemption claim.[5] The Superior Court granted Burbank and the State summary adjudication of the federal preemption issue, holding, *inter alia*, that Section 21661.6 constituted a legitimate exercise of the police power by the State and Burbank that is not preempted by any federal laws or regulations. The Superior Court specifically rejected the Airport Authority's claim, which it previously had made in its motion for summary judgment filed in the District Court, that *City of Burbank v. Lockheed*, 411 U.S. 624 (1973) and *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), require a finding that Section 21661.6 and the Review Procedures are preempted. The Superior Court held that Section 21661.6 properly gives local governments the right to exercise their police powers to review and approve plans for the expansion of existing airports in their communities, and found that no federal statute indicates the express or implied intent of Congress to deprive local governments of the right to control the use of land.

All of the parties subsequently filed cross-motions for summary judgment and/or summary adjudication of the state law issues presented in the case. On February 18, 1998, the Superior Court granted the Airport

---

[5] A true and correct copy of the Superior Court's decision is attached as Exhibit A to Burbank's Request for Judicial Notice, filed on this date.

Authority summary judgment, holding that as a matter of *state* law, Burbank had delegated to the Airport Authority its right to enforce Section 21661.6 because the Joint Powers Agreement creating the Airport Authority authorized it to acquire property for Airport purposes.[6] Burbank and the State of California have appealed that decision.

ARGUMENT IN OPPOSITION TO PETITION

I. THE PETITION SEEKS ONLY AN ADVISORY OPINION, BECAUSE THE AIRPORT AUTHORITY HAS AVAILED ITSELF OF A STATE JUDICIAL FORUM, FULLY LITIGATED ITS SUPREMACY CLAUSE CLAIM, AND OBTAINED RELIEF FROM ENFORCEMENT OF SECTION 21661.6

A. Petitioner Seeks Review Of An Issue That Was Not Decided Below

Petitioner would have this Court believe that it is a public entity that has been deprived of a forum to adjudicate its claim that a particular state statute is preempted by federal law. Throughout its brief Petitioner frames the issue it requests this Court to review as whether a political subdivision of a state may be prevented from attacking the validity of a state statute on the basis that it violates the Supremacy Clause.[7]

---

[6] A true and correct copy of the Superior Court's decision is attached as Exhibit B to Burbank's Request for Judicial Notice.

[7] *See, e.g.*, Petition at 2: "Political subdivisions – bound to follow federal law like all other entities – are thus prohibited from seeking judicial decisions on important preemption issues."

But that is not the issue that was decided below. In this instance, Petitioner, a political subdivision of the State of California, not only has a separate state judicial forum in which to adjudicate its claim that Section 21661.6 is preempted by federal law, it has actively pursued that claim in state court. Petitioner filed a cross-complaint in the State Court Action setting forth the identical preemption claim raised in its federal court action, actively pursued that claim, and lost on that issue.

The Ninth Circuit (and the District Court) found that Petitioner had no standing to maintain its Supremacy Clause claim against the State or another political subdivision thereof ***in federal court***. *See* Petition, App. A at A-2, A-3; App. B at B-8, B-10. Neither lower court held that Petitioner was deprived of any and all fora in which to pursue its preemption claim or otherwise passed on the issue of whether Petitioner could assert that claim in state court. Neither Burbank nor the State ever objected to the Airport Authority pursuing its Supremacy Clause claim in the State Court Action and, as noted above, the Airport Authority did just that through the filing of a cross-complaint.[8]

The California Supreme Court has held that political subdivisions of the state may challenge state statutes as

---

[8] At no time during the State Court Action did the Airport Authority assert that the California Superior Court was an inadequate or prejudiced forum that impaired its ability to adjudicate its Supremacy Clause claim. Similarly, the Airport Authority did not avail itself of the opportunity provided under California law to transfer the State Court Action out of Los Angeles County, where the case was filed and Burbank (as well the Authority) is located. *See* Cal. Code Civ. Proc. § 394.

violative of the Supremacy Clause. *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 8 (1986). This acceptance of federal preemption claims by the courts of the State of California is perfectly permissible, notwithstanding the Ninth Circuit's conclusion that there is no standing to raise such a claim in federal court. As the Court explained in *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989), "state courts are not bound to adhere to federal standing requirements [and] they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law."

Accordingly, the Airport Authority is a wholly inappropriate party to present the issue set forth in its Petition ("[W]hether a political subdivision – even if unable to challenge state action under the Fourteenth Amendment – may maintain a constitutional challenge to state action under the Supremacy Clause"),[9] since it has a state court forum for its preemption claim and has pursued that claim to its fullest. The issue presented by the Petition simply does not reflect the actual decision of the Court below.

Given the Airport Authority's filing and prosecution of a federal preemption claim in state court, the real issue underlying the Petition is whether it may bring a Supremacy Clause claim in federal court ***notwithstanding*** the fact that there exists a state forum in which to litigate that claim. That argument, however, is not expressly set forth in the Petition, and for obvious reasons. This Court

---

[9] Petition at 8.

expressly has rejected the contention that every entity "asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal district court, regardless of the legal posture in which the federal claim is raised." *Allen v. McCurry*, 449 U.S. 90, 103 (1980). Indeed, the state courts are presumed to be competent to decide federal constitutional issues. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2037 (1997). Respect for the place of the states in our federal system requires that state courts have the opportunity to incorporate federal constitutional principles into their rules of law. Accordingly, Petitioner presents to the Court an issue – whether there exists ***any*** forum for a political subdivision to adjudicate a Supremacy Clause claim – that neither was raised nor decided below.

B. Petitioner Seeks An Advisory Opinion, Because It Already Has Received Complete Relief

Given the final holding in favor of the Airport Authority in the State Court Action, any decision rendered by this Court most assuredly would be no more than an advisory opinion. The Airport Authority explains in the Petition that it filed its federal action "to secure its right to move forward" with its Terminal Expansion Plan, suggesting that the dismissal of that case somehow thwarted its efforts to do so. Petition at 5. However, Petitioner already achieved that very goal in the State Court Action. While the Airport Authority did not prevail on its federal preemption claim, it ***did*** obtain a decision that, as a matter of state law, Burbank has delegated away its Section 21661.6 approval powers to the Airport Authority. Although Respondents have appealed the

Superior Court's decision, at present neither Burbank nor the State may enforce Section 21661.6 against the Airport Authority.

Thus, even if the Court were to grant the Petition, reverse the Ninth Circuit's decision and remand the case to the District Court, there is nothing that Petitioner could accomplish by pursuing its federal case. To the contrary, given that the California Superior Court held that Section 21661.6 is inapplicable to the Airport Authority under ***state law***, federal abstention would be appropriate for a number of reasons to allow the parties to exhaust all appeals in the State Court Action. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention when resolution of unsettled question of state law may make it unnecessary for federal court to reach constitutional issue); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (Federal courts will not decide constitutional issues affecting legislation if the record presents adequate and independent state law grounds upon which the case may be disposed.); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (abstention to avoid duplicative litigation).

As the Court recently reminded the lower federal courts, they "ought not consider the constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts" in order to avoid risking friction by attempting to construe a state statute not yet reviewed by the state's highest court. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073 (1997). Petitioner, through its filing of a cross-complaint in the State Court Action alleging violation of the Supremacy Clause and its motion for summary judgment

in that case, has initiated just such a process.[10] Based on federalism principles and the circumstances of this case, the Court should deny the Airport Authority's request that it take up the broad, hypothetical question of when, if ever, the federal courts should become embroiled in internal disputes between states and their political subdivisions over the validity of state statutes under the Supremacy Clause.

II. THE DECISIONS OF THE COURT ARE NOT IN CONFLICT

Petitioner contends that the Court should accept review so that it can expressly overrule cases like *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), *Trenton v. New Jersey*, 262 U.S. 182 (1923), and *Williams v. Baltimore*, 289 U.S. 36 (1933), which all held that a political subdivision could not maintain a claim against a state that state legislation violates its rights on federal constitutional grounds. Petitioner argues that later decisions of the Court such as *Board of Educ. v. Allen*, 392 U.S. 236 (1968), conflict with *Hunter*, *Trenton*, and *Williams* and implicitly overruled them, causing confusion in the lower federal courts.

No such conflict exists between these cases, and the Court most certainly has not silently overruled any of them. The Ninth Circuit (and the District Court) correctly followed Supreme Court and Circuit precedent holding that a political subdivision of a state may not sue its

---

[10] The Superior Court in the State Court Action was the first court ever to construe Section 21661.6.

creators in federal court to challenge the constitutionality of a state statute.

Although *Hunter*, *Trenton*, and *Williams* are not described as "standing cases" per se, they established rules of law applicable to the jurisdictional issue of whether a political subdivision of a state may sue the state to challenge the constitutionality of state law. Because a political subdivision is created by the state and can be destroyed by the state, there is no case or controversy in an action brought by a political subdivision against the state (or another political subdivision); the political subdivision cannot establish the requisite "personal stake in the outcome" of a case against the state "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr*, 369 U.S. 186, 204 (1962).

In *Hunter*, the Court affirmed a Pennsylvania state court judgment ordering the consolidation of Pittsburgh and Allegheny pursuant to a state annexation statute. Pittsburgh challenged the consolidation, claiming that the statute violated it rights under the state and federal constitutions. The Court upheld the state court's determination that the statute did not deprive the city of property without due process in violation of the Fourteenth Amendment,[11] holding that the city did not have any due process rights vis-a-vis the state because "the state is supreme, and its legislative body, conforming its action to

---

[11] The Court refused to consider portions of the state court's decision relating to the city's claims under the Pennsylvania Constitution. 207 U.S. at 176.

the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." *Id.* at 179.

Similarly, in *Trenton*, the Court reviewed a state court judgment and denied the city of Trenton's claims that a New Jersey statute violated the city's rights under the Contract Clause and deprived it of property without just compensation in violation of due process. 262 U.S. at 183. The Court held:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.

Id. at 187 (citation omitted). *See also City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923) (rejecting city's claim that state statute violated its rights under Equal Protection Clause because the "regulation of municipalities is a matter peculiarly within the domain of the state" and the "city cannot invoke the protection of the Fourteenth Amendment against the state."). In *Williams*, the Court also rejected a city's claim that a state statute denied it equal protection under the Fourteenth Amendment on the basis that "a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." 289 U.S. 36, 40 (1933).

Contrary to Petitioner's assertion, *Board of Education v. Allen*, 392 U.S. 236 (1968), *Washington v. Seattle Sch.*

Dist., 458 U.S. 457 (1982), and *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), do not conflict with *Hunter, Trenton, Williams*. None of those cases expressly addressed the issue of whether a political subdivision of a state may challenge the validity of a state statute on federal constitutional grounds.

In *Allen*, the Court affirmed a New York state court judgment rejecting the claim of various school boards that a state statute violated the First and Fourteenth Amendments because it required local public school authorities to lend textbooks to students in all schools, including parochial schools. The Court specifically noted, as had the New York Court of Appeals, that members of the school boards had the requisite "personal stake in the outcome" of the litigation to establish standing on appeal because under state law they could be removed from office if they refused to comply with the statute at issue. 392 U.S. at 1925 and n.5. *Cf.* 20 N.Y.2d 109, 119 (1967). *See also Asarco*, 490 U.S. at 618 (This Court found that it had jurisdiction on appeal, even though plaintiffs would have lacked standing to file the case in federal district court, because the state court's judgment created a case or controversy.) Furthermore, individual defendants intervened to defend the statute in the state court and Supreme Court proceedings, providing further assurance that sufficient adverseness existed between the parties to ensure the adequate presentation of the constitutional issues to the courts.

In *Seattle School District*, the Court reached the merits of a federal suit brought by local school districts against the state of Washington to challenge the validity of a state statute under the Equal Protection Clause, without

addressing whether the school districts – political subdivisions of the state – had standing to bring the action. 458 U.S. at 459. Petitioner contends that the Court's exercise of jurisdiction over the case was tantamount to the *sub silentio* overruling of *Hunter* and its progeny.

That argument ignores two critical points. First, several non-governmental community organizations and the federal government intervened as plaintiffs in the suit, guaranteeing that parties on either side of the action were adverse and that a true controversy existed. *See* 458 U.S. at 464. Second, the Court's mere exercise of jurisdiction is ***not*** precedent for the existence of jurisdiction. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.").

Petitioner's citation to *Lead-Deadwood* is similarly unavailing. In that case, the Court reviewed a state court decision addressing a local school district's constitutional challenge to a state statute under the Supremacy Clause. The Court noted that the state court action was filed after a district court dismissed a federal suit between the same parties that had raised the identical federal preemption issue, on the basis that the federal preemption claim did not convert the challenge to state law into one arising under federal law for purposes of federal jurisdiction. 469 U.S. at n.6. Before addressing the merits, the Court stated in a footnote that the District Court's dismissal of the federal action was improper because a Supremacy Clause claim does present a federal question. *Id.* The Court did ***not*** consider or decide the issue of whether one political

subdivision has standing to sue another political subdivision over the constitutionality of a state statute under the Supremacy Clause. *Lead-Deadwood*, therefore, may not be construed as precedent that standing in federal court exists for such challenges.

III. SINCE THE COURT DENIED THE PETITION FOR A WRIT OF CERTIORARI IN *SOUTH LAKE TAHOE*, THERE HAS BEEN NO CONFLICT IN THE CIRCUITS OVER THE STANDING ISSUE

The Airport Authority suggests that the Court should grant its Petition, in part, because the Ninth Circuit's decision conflicts with the decisions of five Circuits (Third, Fourth, Fifth, Sixth and Eleventh) and with the California Supreme Court. Petition at 11-12. Petitioner also argues that the decisions of this Court are causing confusion among the Circuits. These assertions simply are incorrect.

The Ninth Circuit affirmed the dismissal of the Airport Authority's case on the basis that it was barred under the Circuit's 1980 opinion in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), which held that as a political subdivision of the state, the city had no standing in federal court to challenge the land use ordinances and plans of another political subdivision of the state on any constitutional grounds, including the Supremacy Clause. *Id.* at 233. A petition for a writ of certiorari in *South Lake Tahoe* was denied by this Court in 1980. 449 U.S. 1039 (1980). In the eighteen years since that decision, ***no*** Circuit has revisited the question of whether

a political subdivision has standing in federal court to challenge state legislation under the Supremacy Clause, until the Ninth Circuit issued its decision in this case.

In all of the cases cited by the Airport Authority that were decided after *South Lake Tahoe*, the Circuits have found, as the Ninth Circuit did, that political subdivisions of the state did ***not*** have standing in federal court to raise constitutional claims against state defendants. In the first case cited by Petitioner, *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), the Court dismissed plaintiff's action under 42 U.S.C. § 1983 on the basis that it had no rights under the Fourteenth Amendment or Due Process Clause that it could assert against another political subdivision of the state. In *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), the federal government sued the state of Alabama, state education authorities and all state four-year institutions of higher education. The court subsequently permitted Alabama State University to realign as a plaintiff, but held that it had no standing to raise a Fourteenth Amendment claim against the state. In *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991), the Court determined that a County lacked third party standing to claim that the New Jersey Supreme Court Chief Justice violated a third party's First Amendment rights. The Court noted that cases such as *Williams* and *South Lake Tahoe* "reflect the general reluctance of federal courts to meddle in disputes between state governmental units." *Id.* at 755.

Contrary to Petitioner's assertion (Petition at 11-12), the Fourth Circuit in *School Board v. Baliles*, 829 F.2d 1308 (4th Cir. 1987), did ***not*** decide whether a political subdivision had standing to challenge state legislation under the

Supremacy Clause. That case did not even involve a Supremacy Clause claim. Rather, a local school board and several individual plaintiffs sued the state of Virginia under the Fourteenth Amendment to compel the state to fund remedial and compensatory programs to eliminate lingering effects of segregation. Because the individual plaintiffs did not appeal the District Court's denial of the requested relief, the Fourth Circuit first considered whether the school board had standing to appeal. The Court concluded that the board had standing only on a derivative basis, to represent the interests of white and black students. *Id.* at 1310-11. Thus, *Baliles* does ***not*** support Petitioner's assertion that that the Fourth Circuit "permit[s] political subdivisions to challenge state action under the Supremacy Clause." Petition at 11.[12]

Furthermore, Petitioner is incorrect in asserting that the Second and Tenth Circuits have not addressed what it terms the "*Hunter* rule." *See* Petition at 12-13. Both Circuits expressly have followed it, and dismissed constitutional claims brought by political subdivisions against states. *See City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) ("the validity of this rule . . . remains controlling authority when the challenged statute is the work of a State legislature"); *Housing Auth. of Kaw Tribe of Indians v. City of Poncha City*, 952 F.2d 1183, 1188 (10th Cir. 1991), *cert. denied*, 504 U.S.

---

[12] Petitioner also cited the California Supreme Court as having taken a position in conflict with that of the Ninth Circuit. Petition at 10. As noted *supra*, state courts are not bound by federal court rulings on the issue of standing in federal court. *Asarco*, 490 U.S. at 617.

912 (1992) ("It is well established that a political subdivision may not lodge constitutional complaints against its creating state.").

It is abundantly evident that since this Court's denial of the petition for a writ of certiorari in *South Lake Tahoe*, there exists no actual conflict in the decisions of various Circuits on whether a political subdivision of a state has standing in federal court to bring a Supremacy Clause claim. In none of the cases cited by Petitioner did the court rule on the issue of whether there was federal court standing to mount a federal preemption challenge to a state statute. Indeed, to the extent that any of the cases from other Circuits relied upon by Petitioner as creating a conflict among the Circuits raised that issue in *dicta*, such statements merely are evidence that the issue has not been fully considered and decided by that Circuit and, therefore, is not appropriate for consideration by this Court.

The Airport Authority is correct only in its assertion that *South Lake Tahoe* conflicts with the earlier decision of the Fifth Circuit in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), which was decided before this Court considered the Petition for Writ of Certiorari in *South Lake Tahoe*. In *Rogers* the court held that a school district had standing in an action against a state to claim that a state statute violated the Supremacy Clause.[13] Of course, in *Rogers* there was no parallel state

---

[13] Even the *Rogers* decision did not hold that a political subdivision of a state has standing in federal court to sue the state under *every* provision of the United States Constitution. Thus, the Fifth Circuit did not reject the *Hunter* line of cases –

court proceeding in which the identical Supremacy Clause claim was being litigated between the identical parties.

This Court denied petitions for a writ of certiorari in both *Rogers* and *South Lake Tahoe*. In the intervening eighteen years, no other Circuit has decided the issue of whether a political subdivision of a state has standing in federal court to maintain a Supremacy Clause claim. There is nothing compelling about the instant case that warrants reconsideration of that issue now. To the contrary, given the state court forum already provided to and utilized by Petitioner to adjudicate its Supremacy Clause claim against Burbank and the State of California, this would be a particularly inappropriate case in which to consider the issue raised by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DENNIS A. BARLOW
TERRY B. STEVENSON
City of Burbank, California
275 East Olive Avenue
Burbank, California 91510
(818) 238-5700

**Counsel of Record*

PERRY M. ROSEN*
DANA C. NIFOSI
CUTLER & STANFIELD, LLP
700 Fourteenth Street, NW
Tenth Floor
Washington, D.C. 20005
(202) 624-8400

Attorneys for Respondent City of Burbank

---

the action that the Airport Authority requests that this Court take.

Supreme Court, U.S.
FILED
AUG 21 1998
CLERK

No. 98-124

In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY,
A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK,
A Municipal Corporation,

JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California,

STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF CALIFORNIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK WALSTON
Chief Assistant Attorney General
THEODORA P. BERGER*
RICHARD FRANK
Assistant Attorneys General
300 South Spring Street
Los Angeles, CA 90013
(213) 897-2639

Attorneys for Respondent State of California

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a political subdivision of a state may maintain an action in federal court challenging the Constitutionality of a statute of its sovereign State, where the political subdivision has litigated the identical issue in state court, where the matter may be resolved upon independent state law grounds, and where the matter is on appeal in state court.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Burbank-Glendale-Pasadena Airport Authority was the Plaintiff in the United States District Court for the Central District of California, and was the Appellant in the United States Circuit Court of Appeals for the Ninth Circuit.

Respondents City of Burbank and James van Loben Sels were defendants in the United States District Court for the Central District of California, and were Appellees in the United States Circuit Court of Appeals for the Ninth Circuit.

Respondent State of California intervened as a defendant in the United States District Court for the Central District of California, and was an Appellee in the United States Circuit Court of Appeals for the Ninth Circuit.

Herein, all State Respondents respond together, as "the State," or "State Respondents."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO PETITION 6

I. REVIEW BY THE COURT IS UNNECESSARY SINCE PETITIONER HAS ALREADY INVOKED THE REVIEW OF THIS QUESTION BY THE STATE COURTS, WHICH ARE FULLY COMPETENT TO ADJUDICATE THE QUESTION AND ARE, IN FACT, DOING SO 6

II. THE NINTH CIRCUIT CORRECTLY APPLIED COURT PRECEDENT IN DENYING STANDING TO PETITIONER 9

III. THE PURPORTED CONFLICT IN THE CIRCUITS IS ONLY A DEBATE IN DICTA, NOT A CONTROVERSY THAT MERITS THE COURT'S ATTENTION OR ACTION 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Amata v. Wilentz, 952 F.2d 742 (3d Cir. 1991) 14

Board of Education v. Allen, 392 U.S. 236 (1968) 10, 11, 14

City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir. 1979), *cert. denied*, 449 U.S. 1039 (1980) .. 4, 9, 14

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 8

Hunter v. Pittsburgh, 207 U.S. 161 (1908) 9, 10, 11, 12, 13, 14

Lawrence County v. Lead-Deadwood School District, 469 U.S. 256 (1985) 10, 12

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 8

Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979) 13, 14

School Board of City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987) 14

South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 13

Tafflin v. Levitt, 493 U.S. 460 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

Trenton v. New Jersey, 262 U.S. 182 (1923) 9, 10, 11, 12, 13, 14

United States v. Los Angeles Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 11

United States v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986) 13, 14

Washington v. Seattle School District, 458 U.S. 457 (1982) 10, 11, 14

Williams v. Baltimore, 289 U.S. 36 (1933) 10

STATUTES

28 U.S.C. § 1257 7

42 U.S.C. § 1983 ..... 13, 14

Cal. Gov't Code § 6546.1 2

Cal. Pub. Util. Code § 21661.6 ..... 1, 3, 5

U.S. Const., art. I, § 8 3

U.S. Const., amend. XIV, § 1 3

U.S. Const., art. VI, cl.2 ..... 1, 3

OPINIONS BELOW

The Petition for Writ of Certiorari accurately reflects the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, and of the District Court for the Central District of California, which are set forth in Appendices A and B, respectively, to the Petition. The order of the Ninth Circuit denying Petitioner's petition for rehearing and denying Petitioner's suggestion for rehearing *en banc* is set forth in Appendix C to the Petition.

JURISDICTIONAL STATEMENT

State Respondents agree with Petitioner's statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Petition correctly states that this case involves the Supremacy Clause, U.S. Const., art. VI, cl.2. This case also involves California Public Utilities Code, Section 21661.6, which provides:

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of the property may begin.

(e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.

(f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

STATEMENT OF THE CASE

Petitioner is a joint powers agency, a political subdivision of the State of California formed pursuant to specific authorization by the California Government Code (Cal. Govt. Code § 6546.1) and a joint powers agreement entered into by the three constituent cities pursuant to that specific authorization. Petitioner owns and operates a single airport, one of the approximately 260 airports that hold permits from the California Department of Transportation.

The State of California closely regulates all areas of airport operation not regulated by the Federal Aviation Administration. One such area of regulation is the acquisition of property for the purpose of expanding a publicly owned airport. For over a quarter of a century, California law has required that before a publicly owned airport can acquire land for expansion of that airport, it must obtain the approval of the city or county where the expansion land is located. (Cal. Pub. Util. Code § 21661.6.) It is this state statute that Petitioner claims is preempted by federal law.

Petitioner seeks to acquire land to build a relocated and vastly expanded passenger terminal for the Burbank Airport. Petitioner correctly represents to the Court that it has satisfied the federal requirements for this proposed project (Petition, p. 5, note 3). However, it has openly refused to comply with state law requirements, in that it has attempted to acquire land for its proposed expanded terminal without obtaining the consent of Respondent City of Burbank, within whose jurisdiction the land lies and upon whose citizens the impacts of the expanded terminal would be visited.

While Respondent City of Burbank was considering the proposed land acquisition, Petitioner filed the case below in the District Court for the Central District of California, seeking a declaration that the Public Utilities Code section in question is preempted by federal aviation law and regulations, pursuant to the Supremacy Clause, U.S. Const., art. VI, cl.2. It also alleged violation of the Commerce Clause, U.S. Const., art. I, § 8, and the Due Process Clause, U.S. Const., amend. XIV, § 1.

Petitioner initially sued only Respondent City of Burbank, then added Respondent James van Loben Sels, in his capacity as Director of the California Department of Transportation. The State of California moved for and was granted permission to intervene to defend the constitutionality of its statute.[1]

The District Court dismissed the suit on the ground that Petitioner lacked standing to make the constitutional challenge in federal court to the statute of its sovereign State, citing *City of South Lake Tahoe* v. *California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980).[2] The Ninth Circuit affirmed,[3] and later denied Petitioner's suggestion for rehearing *en banc*.[4]

Notwithstanding the decision of the District Court, and while its appeal was pending in the Ninth Circuit, Petitioner aggressively pursued its attempt to acquire the expansion land. In response, Respondent City of Burbank filed suit in state court to enjoin Petitioner from acquiring the expansion land until Petitioner complied with Public

---

[1] Petitioner asserts that the State of California has waived its immunity from suit under the Eleventh Amendment. However, in its oral motion to intervene, the State expressly indicated that it was *not* waiving Eleventh Amendment immunity as to any monetary claims made against the State treasury; rather, the State's intervention was limited to defense of the constitutionality of the state statute, and its waiver of immunity was limited to those equitable and declaratory relief claims in the complaint.

[2] Decision found in Appendix B to Petition.

[3] Decision found in Appendix A to Petition.

[4] Order found in Appendix C to Petition.

Utilities Code section 21661.6. Respondent City of Burbank sought a declaration of the validity of that statute.[5] Respondent State of California intervened into this state court action as plaintiffs for the purpose of enforcing the state statute and seeking its validation. Petitioner cross-complained to allege, *inter alia*, that the state statute was preempted by federal aviation laws and regulations. This was, of course, the identical issue – phrased in substantially identical words – raised by Petitioner in its federal action against Respondents in the previously dismissed federal action.

The state court heard cross-motions for summary adjudication of issues in two stages. It first heard cross-motions by the parties on the issue of federal preemption of the state statute by federal law pursuant to the Supremacy Clause. The state trial court resolved these issues against Petitioner, ruling that Public Utilities Code section 21661.6 was not preempted by federal law or regulations.[6] Second, the state trial court heard cross-motions on issues of state law, including the question of whether Respondent City of Burbank was legally able to delegate, and in fact had delegated, to Petitioner all of its rights under state law to review acquisition of property for expansion of the Burbank Airport, through the act of entering and later amending the joint powers agreement that created Petitioner. The state trial court ruled for Petitioner on the delegation issue, entered a judgment in

---

[5] As indicated in the Petition (p. A-9), the Ninth Circuit took judicial notice of the state action.

[6] This decision is found in Appendix A to Respondent City of Burbank's Request for Judicial Notice.

favor of Petitioner, and dismissed Respondents' case.[7] Respondents City of Burbank and State of California have appealed this state court judgment, and the case is currently pending in the California Court of Appeal for the Second Appellate District.[8]

ARGUMENT IN OPPOSITION TO PETITION

I. REVIEW BY THE COURT IS UNNECESSARY SINCE PETITIONER HAS ALREADY INVOKED THE REVIEW OF THIS QUESTION BY THE STATE COURTS, WHICH ARE FULLY COMPETENT TO ADJUDICATE THE QUESTION AND ARE, IN FACT, DOING SO.

The Petition for Certiorari is essentially a request to the Court that it provide a solution where there is no problem. The Petition implies that Petitioner has *no* forum in which it can adjudicate its preemption claims.[9] However, Petitioner not only has a perfectly adequate forum in which to litigate its preemption claims, Petitioner has done so and has been extremely successful at it. After the U.S. District Court dismissed Petitioner's

---

[7] This decision is found in Exhibit B to Respondent City of Burbank's Request for Judicial Notice.

[8] *City of Burbank, et al.* v. *Burbank-Glendale-Pasadena Airport Authority*, 2d Civil Nos. B123632.

[9] *See*, Petition at p. 7, emphasis in original: "[The rule that a political subdivision may not challenge the constitutionality of a state statute in federal court] has been followed in both federal and state courts to prohibit political subdivisions from mounting constitutional challenges to state action in *any* forum."

federal preemption challenge to the state statute, Petitioner pursued the exact same challenge through a cross-complaint in state court. Petitioner fully litigated its preemption claims in the state trial court and is currently continuing to do so on appeal. Accordingly, Petitioner here is asking for a second bite at the jurisdictional apple. This stratagem represents an undue burden on limited judicial resources.

It is axiomatic that state courts are fully competent to hear and adjudicate claims based upon federal law. *Tafflin* v. *Levitt*, 493 U.S. 460, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.") Thus, the state court process in which all the parties here, including Petitioner, are deeply involved, can be trusted by the Court to fully and competently adjudicate Petitioner's federal claims.

Even if there were any doubt, this Court retains the ultimate authority over preemption claims,[10] and Petitioner can seek review by the Court of any ultimate state law decision if it is dissatisfied with the result.

A compelling case can be made that the federal courts should exercise their discretion to abstain from adjudicating the preemption claims advanced by Petitioner during the pendency of the state court litigation. This legal dispute involves issues of the interpretation and applicability of a state statute that has not yet been

---

[10] 28 U.S.C. § 1257.

considered by any California appellate court. The resolution of these state law issues may altogether avoid or at least narrow federal constitutional questions. The existence of such threshold state law issues suggests the appropriateness of abstention under *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). In addition, the state case is already well-developed and very far along, warranting abstention under the related abstention principles of *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976). *Colorado River* abstention would be appropriate, in order both to avoid the duplication of resources inherent in both a state and a federal court trying essentially identical claims, and to avoid an unseemly and unnecessary conflict between the state appellate decision in this already pending case and a federal court's decision in a remanded case. *Colorado River, supra*, 424 U.S. at 818.

Since Petitioner has a remedy in state court that it is actively – and, so far, successfully – pursuing, and since federal abstention is a fully appropriate outcome, it is difficult to understand the need for the Court's review at this time. Even Petitioner seems to recognize this: it makes the essentially abstract argument that political subdivisions should be able to challenge state statutes under the Supremacy Clause in federal court because otherwise federal "legislation and regulation may go unchecked even though expressly prohibited by the Constitution."[11] With all due respect, whatever may perhaps happen in some theoretical future case, no such concerns

---

[11] Petition, p. 7.

are presented by *this* case. Petitioner can pursue its remedy in state court as it has quite ably done.

II. THE NINTH CIRCUIT CORRECTLY APPLIED COURT PRECEDENT IN DENYING STANDING TO PETITIONER

The Petition here is a frank invitation to the Court to overrule cases that have been vital precedent for a century. Petitioner does so based on its strained reading of several cases in which the Court has granted review where political subdivisions have challenged the constitutionality of statutes of their respective States. Petitioner reads these cases as *sub silentio* overruling the cases upon which the Ninth Circuit relied here, and in its earlier decision in the *South Lake Tahoe* case. Petitioner reasons that because the Court consented to review these cases, the Court precedents upon which *South Lake Tahoe* relies now lack vitality, and that it is time for the Court to renounce them.

But these venerable decisions of the Court are still very much alive. The cases upon which the Ninth Circuit relied in *South Lake Tahoe* are *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1908), and *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923), and their progeny. The latter cases define the relationship between a political subdivision and the State from which that political subdivision draws both its existence and whatever powers it may possess. The *Hunter* and *Trenton* line of cases hold that, because a political subdivision derives both its very existence and the entire scope of its powers from the discretionary grant of its sovereign State, it "has no privileges or immunities under

the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40 (1933). As *Hunter* holds:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."

Hunter, supra, 207 U.S. 161 at 178. As this Court has recognized, it is a basic tenet of federalism that States be allowed to organize their state and local government systems as they see fit. *Id.*

The Court, of course, can and will ultimately judge for itself whether it has overruled these cases, *sub silentio*, merely by agreeing to review the cases cited by Petitioner. However, the better view is that the Court has not so overruled them. The cases cited by Petitioner are *Board of Education* v. *Allen*, 392 U.S. 236 (1968), *Washington* v. *Seattle School District*, 458 U.S. 457 (1982), and *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985). Petitioner's *sub silentio* argument implicitly concedes that *none* of these cases directly overruled the *Hunter-Trenton* line of cases, or their reasoning, based on the standing of the plaintiffs therein. Indeed, only *Lead-Deadwood* even *discussed* the *Hunter-Trenton* holdings, and that was in the dissent, implying that the Court did *not* reject those holdings by taking the *Lead-Deadwood* case for review.

More than that, in both the *Seattle School District* case and the *Allen*[12] case, there were plaintiffs (or defendants defending the statute involved) other than the political subdivisions, and the Court may well have bottomed its exercise of jurisdiction upon the uncontested standing of those other parties.[13] In any event, the fact that the Court did decide these cases on their merits does not imply any ruling whatsoever on the question of the standing of a political subdivision to sue its sovereign State.

The Court has long held that mere exercise of jurisdiction, without any express holding as to the propriety or foundation for such exercise, is not precedent for the existence of jurisdiction. *United States* v. *Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The effect of the omission [of the jurisdictional issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.") Under the *Tucker Truck* reasoning, the mere fact that the *Allen* and *Seattle School District* cases were decided by the Court would not constitute an overruling of the *Hunter-Trenton* cases, even if those cases had no

---

[12] The Petition makes several references to a *Brown* case. (Pet., at pp. 9-11). State Respondents assume that this is an inadvertent error, and that the reference is intended to be to the *Allen* case.

[13] In *Seattle School District*, the Court's opinion points out that "[t]he United States and several community organizations intervened in support of the [School] District" in the case. *Seattle School District, supra*, 458 U.S. at 464. In *Allen*, there were private, individual defendants who intervened to defend the statute and were part of the proceedings at both the state court and the Supreme Court levels. *Allen, supra*, 392 U.S. at 240, note 4.

other parties upon whose presence and standing the Court could ground jurisdiction. *A fortiori*, it cannot constitute an overruling of the *Hunter-Trenton* cases where there were such parties, and there were independent sources of standing.[14]

The Court has not abandoned, *sub rosa* or *sub silentio*, the reasoning of the *Hunter-Trenton* cases that the powers of a local government flow from the State that created that local government, and that the local government remains subject to the supervening will of the State that created and empowered it. *Trenton, supra*, 262 U.S. at 187. A political subdivision such as Petitioner simply has no rights, privileges or immunities to assert against the sovereign State that authorized its creation, and it has no standing to challenge that State's laws on constitutional grounds in federal court.

III. THE PURPORTED CONFLICT IN THE CIRCUITS IS ONLY A DEBATE IN DICTA, NOT A CONTROVERSY THAT MERITS THE COURT'S ATTENTION OR ACTION.

Petitioner characterizes the federal circuits as hopelessly in conflict over the correct application of the

---

[14] Nor does the *Lead-Deadwood* case support Petitioner's argument. *Lead-Deadwood* does not address the *Hunter-Trenton* standing issue, but merely rules on whether a particular claim was or was not a federal law claim for jurisdictional purposes. The fact that the majority opinion was adopted over a dissent that specifically argued that the *Hunter-Trenton* line of cases forbade deciding *Lead-Deadwood* further erodes Petitioner's argument that this case implicitly overruled a century's worth of Court precedent on this question.

Hunter-Trenton principles. While it is true that the circuits' opinions have discussed the issue from time to time, it has almost universally been in dicta. Rather than a raging and vital controversy, there has been more a spirit of academic debate. The precise question presented here, whether a political subdivision of a State may challenge state legislation in federal court under the Supremacy Clause, has *not* been the subject of disagreement in the circuits for nearly two decades.

The cases cited by Petitioners instead reveal a solid uniformity in their holdings. While they may, in dicta, question the current boundaries of the *Hunter-Trenton* rule, the circuits have had no difficulty in applying it, holding consistently that political subdivisions lack standing to bring various claims against their sovereign States.

Both the Sixth Circuit in *South Macomb Disposal Authority* v. *Township of Washington*, 790 F.2d 500 (6th Cir. 1986), and the Eleventh Circuit in *United States* v. *State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), reaffirmed that political subdivisions lacked standing to bring actions under either the Due Process Clause or 42 U.S.C. § 1983 against other political subdivisions of their State or against the State itself, respectively.[15]

---

[15] Petitioner's assertion that *South Macomb* "recognizes that the *Hunter* rule does not prohibit *all* constitutional challenges to state statutes by political subdivisions" (Pet., p. 12) is somewhat disingenuous. All that *South Macomb* recognized was that the *Fifth Circuit* had allowed a Supremacy Clause challenge by a political subdivision in *Rogers* v. *Brockette*, 588 F.2d 1057, *cert. denied*, 444 U.S. 827 (1979), see *South Macomb*, 790 F.2d at 504; the Sixth Circuit itself expressed no opinion on the issue.

In *United States* v. *State of Alabama*, 791 F.2d 1459 (11th Cir. 1986), the Eleventh Circuit followed the *Hunter-Trenton* principles, holding that "[Alabama State University], as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983." *Alabama, supra*, 791 F.2d at 1454-55.[16] The Third Circuit case cited by Petitioner, *Amata* v. *Wilentz*, 952 F.2d 742 (3d Cir. 1991), turns chiefly on its analysis of third party standing and not the *Hunter-Trenton* cases at all. In fact, the Third Circuit reaffirmed the importance of "federalism factors" regarding the reluctance of federal courts to provide a forum for political subdivisions to sue their own States, and rejected the standing of the county to sue a portion of the State judiciary over a First Amendment claim. Finally, the Fourth Circuit case of *School Board of City of Richmond* v. *Baliles*, 829 F.2d 1308 (4th Cir. 1987), does not discuss the *Hunter-Trenton* issues at all, beyond a mere citation to the *Board of Education* v. *Allen* case. *Baliles, supra*, 829 F.2d at 1311. Rather, the Fourth Circuit allowed the school board in that desegregation case to assert the derivative claims of black and white students in prosecuting the appeal after the original plaintiffs had left the case. *Id.*

Thus, the only real conflict among the Circuits that Petitioner can show is between the Ninth Circuit's *South Lake Tahoe* rule barring standing to political subdivisions, and the Fifth Circuit's holding in *Rogers* v. *Brockette* that allowed such a subdivision to maintain a Supremacy Clause challenge to State action. However, this Court was

---

[16] In addition, in *Alabama*, as in *Seattle School District*, there were other plaintiffs whose standing was not challenged. *Alabama, supra*, 791 F.2d at 1454.

presented with that same inconsistency between the Ninth and Fifth Circuits when it was asked to review *South Lake Tahoe* and declined to do so. *City of South Lake Tahoe, et al.* v. *California Tahoe Regional Planning Agency, et al.*, 449 U.S. 1039 (1980). The Court did not consider that inconsistency to be worth reviewing at that time, and no conflict within the Circuits has presented itself since that time that is any more worthy of the Court's time and attention. This is not an issue that requires review.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
RODERICK WALSTON
Chief Assistant Attorney General
THEODORA P. BERGER*
RICHARD FRANK
Assistant Attorneys General

Attorneys for Respondent
State of California

**Counsel of Record*